Powers of the American People, Congress, President, and The Courts

MASUJI MIYAKAWA, D.C.L., LL.D.

Powers

of the

American People, Congress, President and Courts, According to Evolution of Constitutional Construction

By

Masuji Miyakawa, D.C.L., LL.D.

Lecturer of the Law School of the University of Indiana, and the first Japanese Attorney ever admitted to the American bar

---

Washington, D. C.
The Wilkens-Sheiry Co.
1906

Published September, 1906

PREFACE

No argument would seem to be necessary to prove the importance of instructing the students of government in the theory and practical character of the powers of the People, Congress, the President, and the Courts of the United States.

The impression has largely obtained among students of government and others in the Old World that because of its newness the American system could present little of interest or value to the investigator; it has been believed also by many that the American system was inimical to Old World systems. The fact that hitherto no convenient manual of instruction was to be had may have been largely responsible for such misconceptions, and if this work shall be the means of removing such impressions it will have accomplished its purpose.

In preparing it, it has been the endeavor of the author to set forth the clauses of the Constitution upon which each of the four powers rests, as well as the construction that has been given them by the authoritative exposition of the Courts, or well established practice of the government of the United States.

By the Author.

Washington, D. C., U. S. A.

To

Narcissa Hayes

of

Baltimore

as a sincere appreciation of many kindnesses

this volume is dedicated

CONTENTS

ARTICLE I.

THE PEOPLE.

ARTICLE II.

CONGRESS.

ARTICLE III.

THE PRESIDENT.

ARTICLE IV.

THE COURTS.

APPENDIX I.

BEFORE THE PROMULGATION OF THE CONSTITUTION.

APPENDIX II.

LIST OF ILLUSTRATIONS

THE PEOPLE

THE PEOPLE

ARTICLE I.

"We, the *people* of the United States, in order to have a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."—*Preamble of the Constitution of the United States.*

SECTION 1. The prominent term "the people" from the American standpoint is entirely different from the nature of the same title as used in Asiatic and European countries. It has a distinct and different meaning, which Doctors of Law in those countries, no matter how well versed in the principles of laws, can not apprehend until they were in the spirit of the American understanding of it. The word the "people" of the United States in its proper legal acceptation, means the whole mass of male and female citizens constituting the political unit. It is identified as the political entity and artificial person, and not a majority of the individuals composing society and those persons who have the right to vote.

If the Professor of Laws will turn to the Commentaries of Blackstone, he will find at once that under the

head "People," the word "People" is used in the same sense as subjects and not in the sense of the body politic or a part of it. Nowhere will he find "the people" as the American will find in the laws of his country. In fact, in England there is no people from a strict legal contemplation. Bryce emphasized that when he said that "the British Parliament had always been, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the successor to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizens." The word "people," according to the commentaries of Ito, has a singularly interesting significance. The *Komin* or the "people" of Japan is nothing more than *Omitakara* or the "public treasure." The distinguished commentators or rather introducers of the Japanese constitution say: "It is to be noticed that there has been instances of the people calling themselves the Emperor's treasures, as may be seen from the following poem: 'Happy are we, His Majesty's treasure, to have an ample recompense for our earthly existence in having been born at an epoch so full of prosperity and glory.' "

SEC. 2. The full meaning of the term "the people" includes what is called sovereignty. This necessary implication suggests the important question of what is termed

"the sovereignty of the people" of the United States. This question is absolutely practical in America, and theoretical on the other sides of the Pacific and Atlantic. The sovereignty or supreme power resides in the body of the people in the American contemplation. The American idea is based upon the thought that the government is a mere agency established by the people for the exercise of those powers which reside in them, and no portion of sovereignty resides in government.

The English jurists believe that the *jura summi imperii,* or right of sovereignty, resides in those hands in which the exercise of the power of making laws is placed.

The Empire of Japan "shall be reigned over and governed by a line of Emperors unbroken for ages eternal,"[1] which the compilors construe as follows: By "reigned over and governed" is meant that "the Emperor on His throne combines in Himself the sovereignty of the state and the government of the country and of his subjects." The compilors quote the declaration of the Japanese Emperor at the time of his succession to the throne: "We shall reduce the Realm to tranquility and bestow Our loving care upon Our beloved subjects."

It will be admitted by all that sovereignty is not recognized in American law in the same sense in which it is said to exist under the Japanese and English Constitu-

[1] Art. 1, Japanese Constitution.

tions, for one at the other side of the Pacific exists as a divine and sacred right in the Emperor, who shall not be made a topic of derogatory comment nor one of discussion, while the other at the other side of the Atlantic exists as a right, a substantial right, an absolute right in a corporate body, a person, *i. e.,* parliament.

The first Chief Justice, Jay, of the U. S. Supreme Court, said what was true then and still remains to be true when he drew the line of demarkation between the sovereignty of the people and those of the other sides of both oceans: "In Europe the sovereignty is generally ascribed to the princes; here it exists with the people; there the sovereign actually administers the government; here, never in a single instance. Our governors are the agents of the people, and at the most stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities and preeminence, our rulers have none but official; nor do they partake in the sovereignty otherwise or in any other capacity, than as private citizens."[1]

Sec. 3. The inhabitants of the colonies, by the Declaration of Independence that "all men are created equal," and "that governments must derive their just powers from the governed" destroyed all the theories of sover-

[1] 2 Dall. 472.

eignty and substituted by the same instance the new, "that the sovereignty derives all its just powers from the consent of the individual" as a political fact, as a practical fact and as a legal fact.

In the formation of the American government those who assumed to act at the Constitutional Convention toward framing the greatest national instrument have assumed to act in the name of the "people." When it came from their hands it was an unauthorized proposition, but when it was submitted to the people for adoption, assent and ratification and not published and subscribed, the people acted upon it in the only manner in which they can act safely, effectively on such a subject. The second Chief Justice, Marshall, made clear the meaning of "the people" in the preamble of the Constitution when he said that from these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people; and is declared to be ordained in order to form a more perfect union, establish justice, insure domestic tranquility and secure the blessings of liberty to themselves and to their posterity. The assent of the States in their sovereign capacity, is implied in calling a convention and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmation of

the State and could not be negatived by the State governments. The Constitution when thus adopted was of complete obligation, and bound the State sovereignties. It has been said that the people had already surrendered all their powers to the State sovereignties and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in the United States. Much more might the legitimacy of the general government be doubted had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty erected by themselves. To the formation of a league, such as the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people's authority, the necessity of referring it to the people, and of receiving the powers directly from them was felt and acknowledged by all. The government of the Union is then emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit.[1]

[1] McCulloch v. Maryland, 4 Wheaton 316; 4 Curtis 415.

SEC. 4. Now the unwritten understanding of the meaning of "to form a more perfect Union" has been judicially determined, and such judicial conclusions have been accepted. It is unnecessary to go far into the search. It will suffice to quote the following well known decision of the United States Supreme Court:

"The Union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to be perpetual. And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not? But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self government by the States. Under the Article of Confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States, under the Con-

stitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people."

We have already had occasion to notice the expression "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that without States in the Union there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may with reason be said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an "indestructible Union composed of indestructible States."[1]

SEC. 5. We are safe in asserting that the principles underlying the distribution of public functions between different bodies was not invented in the United States. The partition of the powers of government existed in England at the time of the American Revolution. While this is true, it is no less true that the proposition of the

[1] Texas v. White, 7 Wall. 7, 700-726.

THE UNITED STATES CAPITOL

American Constitution to separate, yet preserve coordination and interdependence of the several branches of government, was unique and apparently different from the government of Great Britain. The legal, practical and fundamental difference has been worked out during the time that the American Constitution has been in force. Hence, we will, in the Articles that follow, go back to the olden times and reason out the idea that at the time of the framing of the American Constitution, the Senators represent the States; the Members of the House of Representatives, on the other hand, represent local districts in the United States, the idea being to give to the people of every locality equal representation according to numbers, distributing the burdens of the government in accordance with the voice of its councils.

The classification of the American power of government, with its peculiar delicacies, has been well established. The following have been pointed out: The legislative power, which is the power to make the laws and to alter them at discretion; the executive, which is the power to see that the laws are duly executed and enforced; and the judicial, which is the power to construe and apply the law when controversies arise concerning what has been done or omitted under the Constitution. Legislative power, according to the American legal understanding, deals mainly with the future, and executive

power with the present, while judicial power is retrospective, dealing only with acts done or threatened, promises made and injuries suffered. The opinion of Chief Justice Marshall in this respect will conclude the exposition of this idea. The expounder of the American Constitution said: "The difference between the departments undoubtedly is, that the legislative makes, the executive executed, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments."[1]

However, little analogy exists between the manner of derivation and the powers and rights of the British Parliament and the American Congress. On the contrary, they are almost opposite in nature and degree. Mr. Justice Harlan, in an important case on this point in the United States Supreme Court, said: "In view of the essential difference between the American and English government in respect of the source and depositories of power, the decisions of the English courts on this subject are entitled to but little credit."[2]

SEC. 6. Keeping always in view that paradoxical yet fundamental difference of the idea underlying the distribution of the powers of the governments of Great Britain and the United States, let us proceed a step further, so that we will see the understandings of the legis-

[1] Nayman v. Southard, 10 Wheat. 1, 46.
[2] Tindal v. Wesley, 167 U. S. 204-214.

lative powers of the British Parliament, the Japanese Diet, and the American Congress.

In the British legal theory, between the parliament and the people at large there is no legal distinction, because the whole plentitude of the peoples' rights and powers resides in it, just as if the whole nation were present within the chamber where it sits. Practically, the British Parliament is the depository of the authority of the nation, and is therefore omnipotent. The Japanese Diet, or parliament, on the other hand, has no share whatsoever in the sovereign power. It is true that it takes part in legislation and also has power to deliberate upon laws, but none to determine them. The Japanese compilors of the Imperial Constitution say that the Imperial Diet has the certain responsibility of keeping a supervision over the administration. We admit that this be true. But we, who claim the right of professional knowledge, all agree that such power is indirect. The legislative power in the Diet is founded on the unique proposition to merely serve the political machinery for the sake of a constitutional government. Nowhere in the great charter of Japanese liberty can it be found that the legislative powers are the original authority or omnipotent, as those of the British government, nor have they delegated authority or inherent right to accomplish all objects within the orbit of the legislative department, as those of the

American government. All the different legislative powers are fundamentally and practically vested in the Most Exalted Personage, His Majesty, the Emperor of Japan, the Creator of the Imperial Constitution, the source and fountain head of all political life of great Japan herself.

SEC. 7. When all the powers of sovereignty are exercised by a single person, as is the case in Japan, or body, as in England, who alone makes laws, determines complaints of their violation, and attends to their execution, the question of a distribution of powers can have only a theoretical importance, for the obvious reason that nothing can depend upon it, which can have practical influence upon the happiness and welfare of the people. But, inasmuch as a government with all its powers thus concentrated must of necessity be an arbitrary government, in which passion and caprice is as likely to dictate the course of public affairs as a sense of right and justice, it is a maxim in political science that in order to insure due recognition and protection of rights, the powers of government must be classified according to their nature, and each class intrusted for exercise to a different department of the government. This arrangement gives each department a certain independence, which operates as a restraint upon such action of the other as might encroach on the rights and liberties of the people, and makes it possible to establish and enforce guaranties against at-

tempts at tyranny. After all, we must confess the truth, that the legislative, the executive and the judicial powers of the United States are subjects broader in their extent than the scope of any one man's treatment and reach.

It may be said that material so abundant and voluminous should be approached by a logical and regular method, otherwise no concise and clear presentation of the fundamental principles of the subject should be attempted. It may also be said that if the analysis is just and the distinction clear, a broader conception of the subject may be obtained than by an exhaustive presentation of all. Neither is our plan. It is beyond the power of man to perceive and materialize either process. All that we venture is to try to show what we understand the Legislative, the Executive, and the Judicial powers of the United States *to be,* as applied to the daily affairs and transactions of life. For the powers, *per se,* is the same from the beginning to the end, but the powers which we *see* is the unwritten understanding of the written Constitution, interpreted, construed and applied by the proper tribunals.

CONGRESS

CONGRESS

ARTICLE II.

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."—*Article I, Section 1, the Constitution.*

SECTION 8. The aim of every political constitution is, or ought to be, first, to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and, in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments as will maintain a proper responsibility to the people.[1]

The electors of the representatives are not the rich, more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names more than the humble sons of obscurity and unpropitious fortune.

[1] No. LVII Federalists.

The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the correspondent branch of the legislature of the State.

The objects of popular choice are to be every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, or birth, or religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.

If we consider the situation of the men on whom the free suffrage of their fellow citizens may confer the representative trusts, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.

In the first place, as they will have been distinguished by the preference of their fellow citizens, we are to presume that in general they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements. In the second place, they will enter into the public service under circumstances which can not fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some

pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation against human nature; and it must be confessed that instances of it are but too frequent and flagrant, both in public and private life. But the universal and extreme indignation which it inspires is itself a proof of energy and prevalence of the contrary sentiment. In the third place, those ties which bind the representative to his constituents are strengthened by motives of a more selfish nature. His pride and vanity attach him a share in its honors and distinctions. Whatever hopes or projects might be entertained by a few aspiring characters, it must generally happen that a great proportion of the men deriving their advancement from their influence with the people would have more to hope from a preservation of their favor than from innovation in the government subservive of the authority of the people. In the fourth place, all these securities would be found sufficient with the restraint of frequent elections. The House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiment impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they are

raised; there forever to remain, unless a faithful discharge of their trust shall have established their title to a renewal of it.

We will add, as a fifth circumstance in the situation of the House of Representatives restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interest and sympathy of sentiment, of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society, we answer, the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America; a spirit which nourishes freedom and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.

Sec. 9. I enter next on the examination of the Senate.

The qualification of Senators, as distinguished from those of Representatives, consists in a more advanced age, a longer period of citizenship, and a longer appointment of office. A Senator must be thirty years of age at least; as a Representative's must be twenty-five. The former must have been a citizen nine years; as seven years are required for the latter. And the duration of the office of Senator is six years while that of Representative is two years.

In the first place, the propriety of these distinctions is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires, at the same time, that the Senator should have reached a period of life most likely to supply these advantages, and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national council.

In the second place, it is equally unnecessary to dilate on the appointment of Senators by the State legislature.

Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention[1] is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment and of giving to the State government, as must secure the authority of the former and may form a convenient link between the two systems.

In the third place, the equality of representation in the Senate is another point which, being evidently the result of compromise between the opposite pretentions of the large and the small States, does not call for much discussion. That the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual State, and an instrument for preserving that residuary sovereignty. Another advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the States.

In the fourth place, the duration of their appointments come next to be considered. The mutability in the public councils arising from a rapid succession of new mem-

[1] No. LXI The Federalists.

bers, however qualified they may be, points out in the strongest manner the necessity of some stable institution in the government. Every new election in the States is found to change one-half of the Representatives. From this change of men must proceed a change of opinions, and from a change of opinions a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life and becomes more just as well as more important in national transaction. Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterpising, and the moneyed few, over the industrious and uninformed mass of the people. But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable, nor be truly respectable without possessing a certain portion of order and stability.

In the fifth place, we add that there may be many who will say that a Senate appointed not immediately by the people and for the term of six years, must gradually acquire a dangerous pre-eminence in the govern-

ment and finally transform it into a tyrannical aristocracy. To this we answer, in the language of Mr. James Madison who, with Alexander Hamilton and John Jay, championed the cause for the adoption of the Constitution: "Before such a revolution can be effected, the Senate, it is to be observed, must in the first place corrupt itself; must next corrupt the State legislature; must then corrupt the House of Representatives; and must finally corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the legislature it can not prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the House of Representatives, the opposition of that co-equal branch of the government would inevitably defeat the attempt; and without corrupting the people themselves a succession of new Representatives would speedily restore all things to their pristine order."

Having examined the unique systems of the House of Representatives and the Senate, let us now proceed for the investigation of the powers.

SEC. 10. In the specific enumeration of national powers it is first declared that "the Congress shall have the power to lay and collect taxes, duties, imports, and excises, to pay the debts, and provide for the common defense and

HALL OF THE HOUSE OF REPRESENTATIVES

general welfare of the United States; but all duties, imports and excises shall be uniform throughout the United States."[1]

The power to tax is an incident of sovereignty, and is co-extensive with the subjects to which the sovereignty extend. It is unlimited in the range, acknowledging in its very nature no limit so that security against its abuse is to be found only in the responsibility of the legislature which imposes the tax to the constituency who are to pay it.[2]

This specific power of the national legislature is vitally important for the maintenance of the government; want of this power was chief among the causes for the failure of the old confederacy.

It was also this power, misapplied and arbitrarily imposed, which was the principle cause for the separation of the English colonies in North America from the mother country. Chief Justice Bradley of the Supreme Court of the United States in this regard said:

"England has no written constitution, it is true, but it has an unwritten one, resting on the acknowledged and frequently declared privileges of parliament and the people, to violate which in any material respect would

[1] Art. I, Sec. 8, U. S. Const. 3 Gallatin's Writings (Adams' Ed.). Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429-569.

[2] Veazie Bank v. Fenno, 8 Wall. 533. Scholey v. Rew., 23 Wall. 331. Hylton v. United States, 3 Dall. 171. Income Tax case, 158 U. S. 601.

produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution."[1]

The word "taxes" is defined in the most enlarged sense as embracing all the regular impositions made by the government upon the persons, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. "Duties, imposts and excises" imposed for this purpose are in a strict sense "taxes." But the word "taxes" is often used in contradistinction to these levies; it conduced to certainty to name them separately. The terms "duties" and "imposts" are nearly synonymous, and are usually applied to the levies made by the government on the importation or exportation of commodities; while the term "excises" is applied to the taxes laid upon the manufacture, sale or consumption of commodities within the country, and upon licenses to pursue certain occupations.[2]

There is nothing which can be the subject of property

[1] Slaughter House cases, 16 Wall. 36-115.
[2] Loan Association v. Topeka, 20 Wall. 655, 664; State v. Western Union Telegraph Co., 73 Me. 518. Cooley on Taxation, pp. 3, 23.

that can not be the subject of taxation. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. It is not taxation that a government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.

Every one admits and no one denies that the question of the understanding of "taxation," in the American legal contemplation, we must approach with hesitation.

In construing the American understanding of taxation, Mr. Justice Miller delivered the opinion of the United States Supreme Court. He said: "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true, it is a despotism of the many, of the majority, if you please to call it so, but it is none the less a despotism. It may be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be held by one man than by many."

The theory of American government, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power, which grow out of the essential nature of all free governments. These are implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C and B the wife of D; or which would enact that the homestead now owned by A should no longer be his but the property of B.[1]

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or subject for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitations on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe.

[1] Whitney v. Fond du Lac, 25 Wis. 188; Cooley on Constitutional Limitation, 129, 175, 487; Dillon on Municipal Corporation, 587.

The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most prevailing of all the powers of government, reaching directly or indirectly to all classes of the people.[1] It was said by Chief Justice Marshall, that the "power to tax is the power to destroy." A striking instance of the truth of this proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every State bank circulation within a year or two after its passage. This power can as readily be employed against one class of individuals as in favor of another, so that one class may be ruined and the other given unlimited wealth and prosperity, if there is no implied limitation to the uses for which the power may be exercised.

To lay, with one hand, the power of government on the property of the citizen, and, with the other, to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation. A "tax," says Webster's dictionary, "is a rate or sum of money assessed on

[1] Springer v. United States, 132 U. S. 586; Hylton v. U. S., 3 Dall 171. Pacific Ins. Co. v. Soule, 7 Wall. 433.

the person or property of a citizen by government for the use of the nation or State." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."[1]

Coulter, Judge of Pennsylvania, in the case of Northern Liberties against St. John's Church, says very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operation—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a *public purpose*.[2]

SEC. 11. It is further provided in the Constitution that Congress shall have power "to borrow money on the credit of the United States."[3] The understanding is well expressed by Chief Justice Chase when he rendered the opinion of the United States Supreme Court in answering the question "Were the obligations of the United States, known as certificates of indebtedness, liable to State taxation?" The jurist went on to say that the authority to borrow money on the credit of the United States is, in the enumeration of the powers, expressly

[1] Cooley on Constitutional Limitation, 479. Veagie Bank v. Fenno, 8 Wall. 533.
[2] Loan Association v. Topeka, 20 Wall. 655.
[3] United States Constitution, Article I, 8.

granted by the Constitution, second in place and only second in importance to the authority to lay and collect taxes. Both are given as means to the exercise of the functions of government under the Constitution; and both, if neither had been expressly conferred, would be necessarily implied from other powers. For no one will assert that without them the great powers could be exercised at all.[1] The Chief Justice continued: "The principle of exemption is, that the States can not control the national government within the sphere of its constitutional powers—for there it is supreme—and can not tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control." This opinion was supported with reference to the construction made by Chief Justice Marshall, who said that the American people have conferred the power of borrowing money upon their government, and by making that government supreme have shielded its action in the exercise of that power, is incompatible with a restraining or controlling power, and the declaration that no such restraining or contolling power shall be exercised.[2]

In the case of Bank v. Supervisors, the application of the understanding is made extensively yet clearly. In

[1] The Banks v. the Mayor, 7 Wall. 16.
[2] Weston v. the City of Charleston, 2 Pet. 449.

this case the United States notes became the subject of discussion and construction in regard to State taxation.

In the contentions of the parties against the specific power of Congress, the important and interesting point was this, that as far as the credit of the United States was involved in the issue of these notes, no greater responsibility was assumed by any government in coining or otherwise affixing a stamp to metal, and affixing to it a certain nominal value, although by mixing or debasing the metal, its real value, in use or exchange, may have been totally destroyed. The acts in question did but endeavor to confer a prescribed value on certain stamped paper, which they compelled the citizens of the United States to take in payment of all debts due, or to become due by the government to them, or by them to the government, or to one another. By this means, instead of *borrowing money, Congress made money, and rendered borrowing unnecessary.* The protection from State interference accorded by the Constitution in the exercise by the government of the power of borrowing, can not be invoked in such a case.

In this contention, however, the United State Supreme Court decided that "the notes issued under the acts of Congress, intended to circulate as money, and actually constituting, with the national bank notes, the ordinary circulating medium of the country, are moreover, obliga-

THE U. S. SENATE CHAMBER

tions of the national government, and exempt from State taxation."[1]

SEC. 12. The Congress is further empowered to "regulate commerce with foreign nations among the several States and with the Indian Tribes."

To thoroughly understand the commerce clause of the Constitution it becomes necessary to discuss and construct the powers of the State imposing tax, enacting quarantine laws, harbor regulation, exacting licenses, prohibiting the sale of certain noxious goods or articles, prohibiting the transportation through the State of animals or persons infected with disease, or prohibiting the entry into the State of persons deemed unfit by the people of the State to mingle with them. So that we may keep in view such as these powers and the limitations to these powers when they come in contact with the commerce clause in the Federal Constitution, while at the same time, discuss the understanding of the nature of the power conferred by the commerce clause and the extent of its exercise by the American Congress, which is the proper and main undertaking of the present work.

The conspicuous words in the commerce clause are "to regulate commerce." They at once suggest the extent of power which is to "regulate," and the subject of the regulation which is "commerce." The United States

[1] Bank v. Supervisor, 7 Wall. 26, 31.

Supreme Court had from time to time discussed and constructed the unwritten understanding of the extent and the subject of the power. Nevertheless, the judges in the same cases have occasionally disagreed in several important particulars, one overruling another's decision. Our task, therefore, must be not only reviewing the different decisions of the Supreme Court, but also to distinguish the points and emphasize those upon which the understanding shall have been reached.

Commerce naturally includes traffic or buying or selling of goods and commodities. It embraces transportation of persons and of tangible things, and the exigencies of modern business have brought to play, as an instrument of commerce, the transmissions of messages by telegraph and telephone.[1] Not only does it include navigation and all other forms of intercourse, but it includes all the instruments by which it is accomplished, viz., steamboats, steam railways, stage coaches, bridges, wharves, depots, streams, canals, lakes and everything else which may be termed essential and convenient for the exercise of commerce. Even an embargo act is judicially constructed within the power, although it may seem to us to be the utmost limit of *construction* power under the Constitution. The embargo act of the American Congress, when it was

[1] Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1.

enforced upon all commerce with Great Britain and France, was contested as unconstitutional. It was vigorously urged that it is a branch of the war-making power. It is an instrument of war and not a regulator of trade. But we must not lose sight of the reason of law. The power which controls commerce must from the very nature of things include the power to restrict and limit. Chief Justice Marshall, in the case of Gibbon v. Ogden, said: "When Congress imposed embargo which for a time engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce and the avoiding of war. By its friends and its enemies it was treated as a commercial not as a war measure. The persevering earnestness and zeal with which is was opposed in a part of our country which supposed its interests to be vitally affected by the act can not be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who are arrayed in opposition to this. Yet they never contested that navigation was not a branch of trade, and was therefore not comprehended to the power to regulate commerce. They did indeed contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends they denied that the particular law in question was made in pursu-

ance of the Constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the anihilation and not the regulation of commerce. They admitted the applicability of the words used in the Constitution to vessels; and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on the subject."

Chief Justice Marshall, with the above entitled case, began the first authoritative explanation of the term "Commerce"; since then it has extended with the growth of the subject and the invention of modern appliances, until there is in our mind a clear conception of the extension with the understanding of the meaning of the specific power. In this well-known case we will find that Mr. Aaron Ogden filed his bill, to begin with, in the court of chancery of the State of New York, against Mr. Thomas Gibbon, setting forth the several acts of the legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the exclusive navigation of all waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired, and authorizing the chancellor to award an injunction restraining any person

whatever from navigating those waters with boats of that description. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed, to be employed in the coasting trade, under the act of Congress, passed the 18th of February, 1793. However, the chancellor perpetuated the injunction, which decree was affirmed finally by the highest court of the State. The case was thereupon brought to the United States Supreme Court by writ of error. Chief Justice Marshall, delivering the opinion of the court, among many important things, pointed out: "The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce is undoubtedly traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. If commerce does not include navigation, the government of the Union has no

direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised by the consent of all, and has been understood by all to be commercial regulation. All America understands, and has uniformly understood the word 'Commerce' to comprehend navigation. It was so understood and must have been so understood when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government and must have been contemplated in forming it. The convention must have used the word in that sense because all have understood it in that sense, and the attempt to restrict it comes too late. The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States can not stop at the external boundary line of each State, but may be introduced into the interior. The power of Congress, then, comprehended navigation, within the limit of every State in the Union so far as that navigation may be in any manner connected with 'commerce with foreign nations, or among several States, or with the

Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies. In every such case the act of Congress, or treaty, is supreme and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[1]

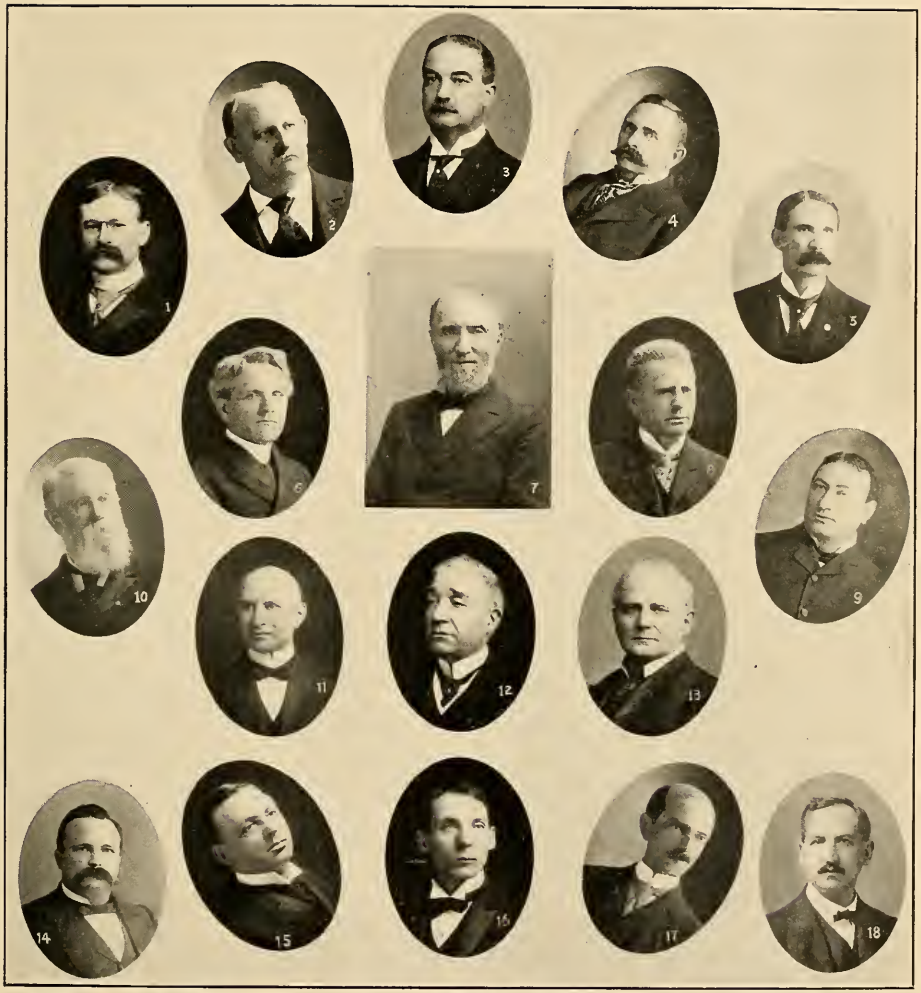
In connection with regulations affecting the navigation of public waters, the State legislature of Alabama enacted a law commanding the owners of steamboats navigating the water of the State to file a statement with the probate judge of Mobile County setting forth the names, residence, or interests of the owners. This was held invalid as conflicting with vessels enrolled and licensed to trade under the law of Congress.[2] It was also held in the case of Moran v. New Orleans that a statute imposing a license tax not on the vessels as property but on the business of owning and operating towboats between New Orleans and the Gulf of Mexico, as invalid, as it puts a price on the privilege of navigating the Mississippi.[3] Closely following the decision of Moran v. New Orleans, we will notice the application of its principles to the understanding of a step further, when the Supreme Court pointed out that a vesesl which is going between the ports of the same State, passes upon the high

[1] Gibbon v. Ogden, 9 Wheat. 1.
[2] Simot v. Davenport, 22 How. 227.
[3] 111 U. S. 69.

sea, is subject to congressional regulation and is not engaged in purely domestic commerce.[2]

SEC. 13. Now there can be no dispute as to the paramount authority of the national legislative power to regulate interstate and international commerce. When, however, the police power of the State comes in full view, clearly distinguishable from the regulation of the commerce, State power is paramount within a State until it comes in conflict with an act of Congress. The State of Maryland passed an act requiring importers of goods to take out a license and pay license fee, but this is held to be an encroachment upon the powers of Congress. In this case the Supreme Court, rendering the decision, said: "The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. It is not, therefore, a matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficiency would tend to defeat an object in the attainment of which the

[2] Lord v. Steamship Co., 102 U. S. 561; Pacific C. S. S. Co. v. Com'rs, 18 Fed. Rep. 10.



SOME MEMBERS OF THE HOUSE OF REPRESENTATIVES, FIFTY-NINTH CONGRESS

Some Members of the House of Representatives of the United States, 59th Congress, 1st Session

1. Charles Frederick Scott, the United States Representative from Kansas, was the President of the State Editorial Association and is a graduate of the University of Kansas.
2. Thetus Willrette Sims, the United States Representative from Tennessee, was Perry County Superintendent of Public Instruction, and is a graduate of the Cumberland University of Lebanon.
3. Daniel Larned Davis Granger, the United States Representative from Rhode Island, was Mayor of the City of Providence, and is a graduate of Brown University.
4. J. L. B. Burnett, the United States Representative from Alabama, was a member of the State Legislature and Senate, and was educated in the Vanderbilt University.
5. James McLachlan, the United States Representative from California, was a District Attorney of Los Angeles County in the State, and is a graduate of the Hamilton College.
6. John W. Gaines, the United States Representative from Tennessee, is a prominent lawyer in the State.
7. Joseph G. Cannon, Speaker of the House of Representatives, from Illinois, is a prominent lawyer in the State.
8. James Harding Southard, the United States Representative from Ohio, was District Attorney of the Toledo County, and is a graduate of the Cornell University.
9. George Washington Cromer, the United States Representative from Indiana, was Mayor and Prosecuting Attorney in the State, and is a graduate of the State University of Indiana, Bloomington, Indiana.
10. Charles Henry Grosvenor, the United States Representative from Ohio, was a Chairman of the Executive Committee of the State Bar Association, and also was a Speaker of the State House of Representatives.
11. Henry M. Goldfogle, the United States Representative from New York, was a Judge of the Municipal Court of New York, and also one of the advisory committee of the educational alliance.
12. Bourke W. Cochran, the United States Representative from New York, was a member of the committee to revise the Judiciary article of the Constitution of New York.
13. Champ Clark, the United States Representative from Missouri, was Chairman of the National Democratic Convention at St. Louis. He was educated in the Kentucky University, Bethany College, and the Cincinnatti Law School. He also was President of Marshall College of West Virginia.
14. James G. McGuire, ex-United States Representative from California, was Judge of the Superior Court of the State. He was also a delegate to the National Democratic Convention.
15. Newton Whiting Gilbert, the United States Representative from Indiana, was a State Senator, and is a graduate of the Ohio State University.
16. Francis W. Cushman, the United States Representative from the State of Washington, is a prominent lawyer in Tacoma.
17. Charles R. Thomas, the United State Representative from North Carolina, was Craven County Attorney, and a member of the State Legislature. He is a graduate of the Emerson Institute, Washington, D. C., and also the University of North Carolina.
18. William Orlando Smith, the United States Representative from Pennsylvania, was a Representative in the general Assembly of his State, and was educated in the public schools in the State.

American public took and justly took that strong interest which arose from a full conviction of its necessity."

What would be the language of a foreign government should it be informed that its merchants, after importing according to law, were fobidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such extraordinary circumstances would expose them? No apology could be received or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the State is sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside, not how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress, and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.[1]

It is likewise held important when a statute imposed a license tax upon persons dealing in goods not produced in the State, while imposing no corresponding tax upon those dealing in goods which are the products of the State.[2] At the same time, although all the citizens of the

[1] Brown v. Maryland, 12 Wheat. 419, 7 Curtis 262.
[2] Welton v. Missouri, 91 U. S. 275.

State of Tennessee were subjected to the same law imposing a tax upon all persons selling goods by sample, it was held void to apply the law to a salesman from an Ohio house soliciting orders for goods to be sent from the State of Ohio.[1]

The acts of the State of New York requiring the master of a vessel bringing passengers from other countries and landing them within the limits, to pay to the State a certain sum per head for every such passenger, or imposing on the shipowner an alternative payment of a small sum of money for each passenger landed, were held void.[2] Neither can the State of California impose a stamp duty upon the bill of lading of all goods sent out of the State, nor can the State of Indiana forbid the conduction from the State in pipes of natural gas.[3] Here again we emphasize that the power to regulate commerce among the States is a unit having been vested exclusively in Congress, and can not be encroached upon by the States. But where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the

[1] Robin v. Shelby Taxing Hist., 120 U. S. 489. Asher v. Texas, 128 U. S. 129.

[2] Passenger cases, 7 How. 283. Henderson v. Mayer, 92 U. S. 259. New York v. Miln., 11 Ret. 103.

[3] Almy v. California, 24 How. 169. State v. Indiana, Ohio, Gas Co., 120 Ind. 575. Kid. v. Pearson, 128 U. S. 1. Phila. S. Co. v. Penn., 122 U. S. 326.

general government, are not strictly such, but are simply local powers which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power.

Chief Justice Fuller, in the case of Leisy v. Hardin, delivering the opinion of the Supreme Court upon the point, said:

"And while by virtue of the jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action."[1] So that when Congress circumscribed by an act, Justice White, in a later case, had emphasized the State power, in rendering opinion of the court: "The Bowman case was decided in 1888, the opinion in Leisy v. Hardin was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an inter-

[1] Leisy v. Hardin, 135 U. S. 100. Henderson v. Mayor of N. Y., 92 U. S. 259. Railroad Co. v. Husen, 95 U. S. 465. Welling v. Michigan, 116 U. S. 446. Robbin v. Shelby Taxing Dest., 120 U. S. 489.

state shipment, only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions as to sale created by State legislation, a right which the decision in Leisy v. Hardin had just previously declared to exist."[1]

SEC. 14. Among the most important of the powers conferred upon Congress is that "to establish a uniform rule of naturalization."

Naturalization is the adoption into the national family and investing the rights, privileges and immunities of citizenship of persons not born to the citizenship. This process involves the fundamental principle underlying American understanding of expatriation, the understanding of the most glorious legal contemplation of the rights of man.

Along the American revolutionary periods so called American fathers insisted upon and made all the world understand the principle of expatriation, that is, the right of man to change his habitation and change his allegiance until it may be said to be practically universal and under it the subjects of all civilized nations have exercised and been protected in the rights.[2]

[1] Rhose v. Iowa, 170 U. S. 412.
[2] Inglis v. Trustees of Sailors Snug Harbor, 3 Pet. 121.

What we have to consider is the particular power of Congress as we understand it with regard to establishing a uniform rule of "naturalization." Under the Constitution Congress is given exclusive jurisdiction on the subject of naturalization. It is plain, when Congress has prescribed a rule, its power is exclusive, and any regulation by any one State would break the rule of uniformity. Therefore, by conforming the act of Congress the complete citizenship can be obtained. It is true that the several States in the Union confer to aliens, after declaring their intention to become citizens, the high privileges of the election franchise. Nevertheless, let all of us understand that a State without power of naturalization can not confer aliens that privilege which the Constitution guarantees, namely: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the United States."

Aliens may be able to secure the complete citizenship according to the acts of Congress which have been enacted from time to time. He may obtain it through birth, the general provision of naturalization or by virtue of being one of the people absolved by treaty.

SEC. 15. To obtain citizenship through birth in point of time and importance is well expressed by Justice Gray in the case of Chinaman Wong Kim Ark. The question submitted to the Supreme Court for decision in the case

was: whether a child born in the United States of parents of Chinese descent who at the time of his birth are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. To which the United States Supreme Court was of the opinion that the question must be answered in the affirmative. Justice Gray, in rendering this important opinion of the court, said: "In this or in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."

The fundamental principle of the common law, with regard to the English nationality, was birth within the allegiance, also called "ligealty," "obedience," "faith," or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual, as expressed in the maxim, *Protectio trahit subjectionum, et subjectio protectionem,* and were restricted to natural born subjects and naturalized subjects, or to those who had taken an oath of allegiance, but were predicable of aliens in amity, so long as they were within the kingdom. Children born in England, of such aliens, were

therefore natural born subjects, but the children born within the realm of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of the part of the King's dominions, were not natural born subjects because not born within the allegiance, the obedience or the power, or, as would be said at this day, within the jurisdiction of the King.[1]

SEC. 16. Among the provisions of naturalization the most discussed one seems to be that of Section 2169, which says: "The provisions of this title shall apply to aliens of African nativity and to persons of African descent." The first point of importance in construction of this section is considered in 1878, also by the Chinese case *in re* Ah Yup. When the case of this Chinese was decided, the Chinese question was flagrant on the Pacific slope, and Judge Sawyer seemed to think, predicating his conclusion upon the debate in Congress, that the purpose of the amendment extending the right of naturalization to Africans and persons of African descent was to exclude Chinese from the benefit of naturalization.

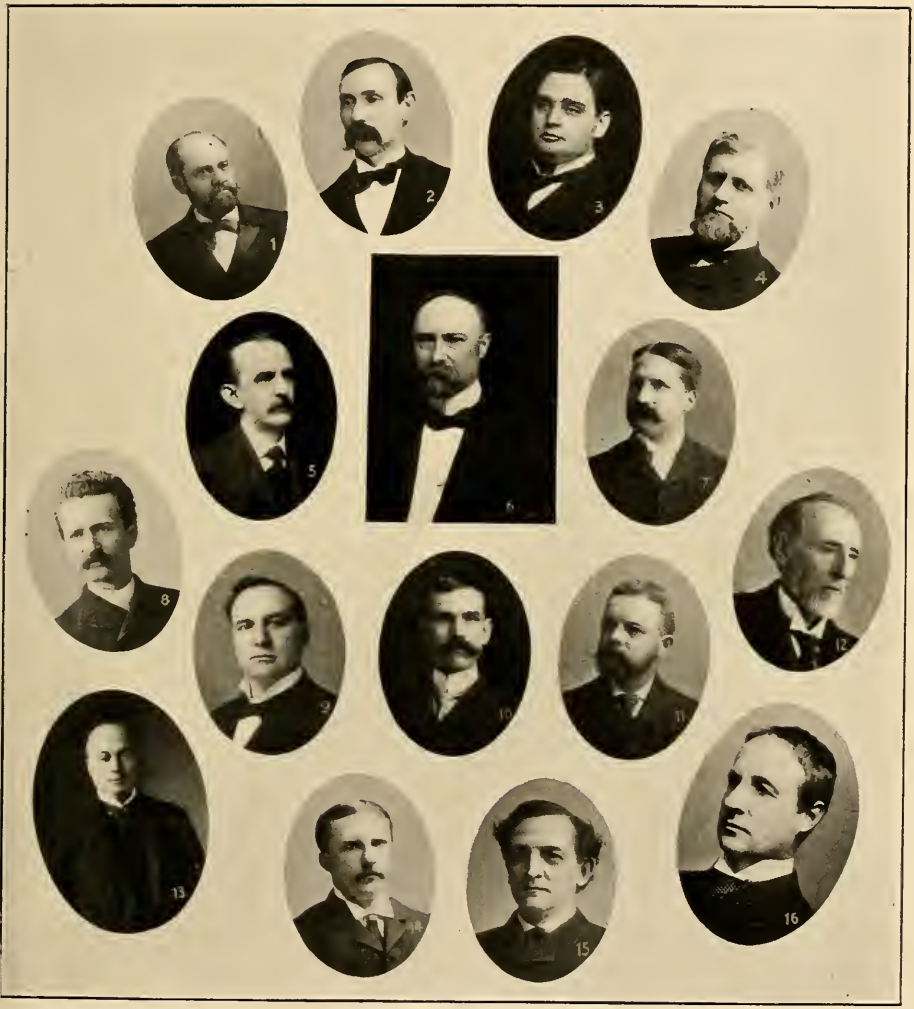
To quote his own language: "Many other Senators spoke pro and con on the question, this being the point of the contest, and these extracts being fair examples of the opposing opinions . . . It was finally defeated (amendment to strike the word 'white' from the naturali-

[1] U. S. v. Wong Kim Ark, 169 U. S. 649.

zation laws), and the amendment cited, extending the right of naturalization to the African only adopted. It is clear from this proceeding that Congress retained the word 'white' in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization . . ."[1]

Later in 1897, when Ricardo Rodriguez, a citizen of Mexico, filed an application in due form, by which he sought to become a naturalized citizen of the United States. The United States District Court, Western District of Texas, concluded that citizens of Mexico were eligible to American citizenship, and may be individually naturalized by complying with the provisions of American laws. Judge Maxey, in rendering the opinion of the court, said a most judicious and far-reaching sequence. The learned judge has in his opinion clearly drawn the line between the strict letter of the law and the meaning and extent of the statute. According to his own words: "The opinion of Judge Sawyer is by no means decisive of the present question, as his language may well convey the meaning that the amendment of the naturalization statutes referred to by him was intended solely as a probihition against the naturalization of members of the Mongolian race. The naturalization of the Chinese is, however, no

[1] *In re* Ah Yup, 155 Sawy.; Fed. Cas. 223.



SOME MEMBERS OF THE UNITED STATES SENATE, FIFTY-NINTH CONGRESS

Some Members of the United States Senate in the 59th Congress, 1st Session

1. George Clement Perkins, the United States Senator from California, was Governor of the State. He is successor to the late Leland Stanford in the United States Senate.
2. James Alexander Hemenway, the United States Senator from Indiana, was the United States Representative from the State. He was prosecuting attorney of the Second Judicial Court of Indiana when George L. Reinharde, present dean of the Indiana University, was Judge, and succeeded C. W. Fairbanks, the Vice-President of the United States.
3. Joseph Weldon Bailey, the United States Senator from Texas, was the nominee for the Speaker of the House of Representatives of the United States.
4. William Boyd Allison, the United States Senator from Iowa, was the United States Representative from the State, and is a graduate of the Western Reserve University.
5. Winthrop Murray Crane, the United States Senator from Massachusetts, was Governor of the State. He was educated at Williston Seminary, Easthampton.
6. Charles W. Fairbanks, the Vice-President of the United States and the President of the Senate, was the United States Senator from Indiana, and a graduate of the Ohio Wesleyan University.
7. John Kean, the United States Senator from New Jersey, was Representative from the State, and a graduate of Columbia and Yale Universities.
8. Robert Marion La Follette, the United States Senator from Wisconsin, was thrice Governor of the State, and is a graduate of Wisconsin University.
9. Elmer Jacob Burkett, the United States Senator from Nebraska, was Representative from the State, and is a graduate of Tabor College and the University of Nebraska.
10. Reed Smoot, the United States Senator from Utah, is a graduate of Brigham Young Academy.
11. Henry Cabot Lodge, the United States Senator from Massachusetts, was a member of the Alaskan Boundary Commission and the United States Representative from his State, and is an alumnus of Harvard, Yale and Clark Universities and also of Williams College.
12. Shelby M. Cullom, the United States Senator from Illinois, was Governor of the State and a United States Representative from the State.
13. Philander Chase Knox, the United States Senator from Pennsylvania, was the United States Assistant District Attorney, President of the State Bar Association, and he was also Attorney General in the McKinley Cabinet and also in the Roosevelt Cabinet. He was educated at the Mount Union College in Ohio.
14. Isador Rayner, the United States Senator from Maryland, was Attorney General of the State, and was educated at the Maryland and Virginia Universities.
15. John Warwick Daniel, the United States Senator from Virginia, was a United States Representative from his State. He was educated at Lynchburg College and the University of Virginia and is an alumnus of Washington and Lee, and Michigan Universities.
16. Francis Griffith Newlands, the United States Senator from Nevada, was vice-chairman of the National Silver Committee, and also the United States Representative. He was educated in Yale University, and Columbian (now George Washington) University of Washington, D. C.

longer an open question, as Section 14, of the Act of May 6, 1882, expressly provides, "that hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

"If Chinese were denied the right to become naturalized citizens under laws existing when *in re* Ah Yup was decided, why did Congress subsequently enact the prohibitory statute above quoted? Indeed, it is a debatable question whether the term 'free white person,' as used in the original act of 1790, was not employed for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country. But it is not necessary to enter upon a discussion of that question; nor is it deemed material to inquire to what race ethnological writers would assign the present applicant. If the strict scientific classification of the anthropologist should be adopted, he would probably not be classified as white. It is certain that he is not an African, nor a person of African descent. According to his own statement he is a 'pure-blooded Mexican,' bearing no relation to the Aztecs or original races of Mexico. Being, then a citizen of Mexico, may he be naturalized according to the law of Congress? If debarred by the strict letter of the law from receiving letters of citizenship, is he embraced within the meaning and

extent of the law, his application should be granted notwithstanding the letter of the statute may be against him."[1]

The instances of collective naturalization by treaty or by statute are numerous. By the treaty of September 27, 1830, such tribes as the Choctaws were made citizens of the United States. All white person or persons of European descent who were born in any of the colonies or resided or had been adopted there before 1776 were by declaration invested with the privileges of citizenship. Under the second article of Jay's treaty,[2] British subjects who resided at Detroit before and at the time of the evacuation of the territory of Michigan, and who continued to reside there afterwards without at any time prior to the expiration of one year from such evacuation declaring their intention of becoming British subjects, become *ipso facto* to all intent and purpose American citizens.[3]

By article three of the treaty of Paris and 8 Stat. 200, 202, which was enacted in pursuance to the treaty, "the inhabitants of the ceded territory" admitted to citizenship. In the case of Dred Scott v. Sanford, Mr. Justice Catron said: "The settled doctrine in the State courts of Louisiana is, the Orleans Territory, after the treaty of

[1] *In re* Rodriguez, 31 Federal Reporter, 337. *In re* Saito, 21 Fed. 126.
[2] 8 Stat. 116, 117.
[3] 143 U. S. 135.

1803 was made, and before Louisiana was admitted into the Union, any one being an inhabitant at the time of the admission became a citizen of the United States by that act; that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new State on its admission. That this is true construction I have no doubt."[1] This point was also emphasized in the Debois case. Debois, of French birth, applied for a license to practice as a counsellor and attorney at law in the Supreme Court of Louisiana, and by one of the rules of the court the applicant could not be admitted unless he was a citizen of the United States. Debois conceded that he had no claims to citizenship by birth or by naturalization under the act of Congress to establish a uniform rule on that subject, but he contended that there was a third mode of acquiring citizenship of the United States, namely, the admission into the Union of a State of which he was a citizen. After an able discussion of the subject, Judge Martin concluded that the applicant must be considered a citizen of the United States.[2] There is, however, one other mode. That is, if any alien should die without having completed his naturalization his widow and children should be considered citizens. This point was made clear in the famous Governor-elect Boyd's case and in

[1] Dred Scott v. Sanford, 19 How. 395, 525.
[2] Debois case, 2 Martin 185.

which the distinguished jurist, Chief Justice Fuller's opinion is authority.[1]

Before concluding the applications and its judicial construction of the acts of Congress, and the congressional power itself, we are brought to confront the landmark which we must always keep in view with regard to the question of naturalization. In the language of Chief Justice Marshall: "The jurisdiction of the nation within its own territory is necessarily conclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an internal source, would imply a diminution of its sovereignty to the same extent in that power which could impose such restrictions. All exceptions, therefore, of the full and complete power of a nation within its own territories, must be traced up to the nation itself. They can flow upon no other legitimate source."[2]

Inasmuch as naturalization is the act by which the member who legally departs his own sovereignty requires membership in the sovereignty to which he migrated, the simple act of emigration is no transfer of citizenship. This is a well understood proposition. It is also well understood that to the act of emigration must be added the act of naturalization in accordance with the laws of the sovereignty to which the emigrant has emigrated. These

[1] Boyd v. Thayer, 143 U. S. 135.
[2] The Exchange, 7 Cranch 116, 136.

two acts combined work the transfer of citizenship. In discussing the expatriation, emigration and naturalization, the recognition of the right of autonomy or regulation of internal affairs of particular sovereignties must be the first principles. The Constitution of the United States has no extra-territorial effect, no more than have the laws of other countries.

"If, therefore, the government of the United States." in the language of Chief Justice Fuller in rendering opinion of the court in the case of Chinese exclusion, "through its legislation department considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion should not be stayed at the time there were no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary."

SEC. 17. Congress shall also have power to establish "uniform laws on the subject of bankruptcy throughout the United States."

Controversies involving the constitutional effects and

operations of State insolvent laws have frequently been under consideration in the Federal tribunal, and unless it be claimed that constitutional questions must always remain open, it must be conceded, we think, that there are some things connected with the general subject that ought to be regarded as settled and forever closed. State authorities have power to pass a bankrupt or insolvent law, provided there be no act of Congress in force establishing a uniform system of bankruptcy conflicting with such laws, and provided the law itself be so framed that it does not impair the obligation of contract.[1]

The American understanding of this specific power of Congress was clearly made known and the principles for such understanding were pointed out time and again. Take the case of Ogden v. Saunders and we will see the three important rules. First, the Supreme Court of the United States held that the power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States did not exclude the right of the States to legislate on the same subject except when the power has actually been exercised by Congress, and the State laws conflicted with those of Congress. Secondly, that a bankrupt or insolvency law of any State which discharges both the person of the debt and his future acquisitions of property, was not a law impairing the obligation

[1] Sturges v. Crowninshield, 4 Wheat. 122.

of contract so far as respects debts contracted subsequent to the passage of such laws. Thirdly, that a certificate of discharge under such a law can not be pledged in bar of an action brought by a citizen of another State in the court of the United States, or of any other State than that where the discharge is obtained.[1]

Among many cases directly bearing upon the principles, the case of Baldwin v. Hale is conspicuous. Baldwin executed at Boston in the State of Massachusetts, his promissory note for two thousand dollars, payable there to his own order and subsequently indorsed such note to Hale. Consequently, Baldwin had a certificate of discharge in a proceeding in the court of Massachusetts, which certificate embraced by its terms all contracts to be performed within the State of Massachusetts; but in this insolvency proceeding Hale did not prove his debt or take any part. At the time of the execution of the note and commencement of the proceeding, Hale was a citizen of Vermont and Baldwin of Massachusetts. Baldwin pleaded on the certificate of the State insolvency court as the bar to action, but the United States Circuit Court in the district of Massachusetts did not sustain Baldwin's contentions. Hence, the writ of error for the determination of the United States Supreme Court. Justice Clifford who rendered the opinion of the court,

[1] Ogden v. Saunders, 12 Wheat. 213.

concluded that insolvent laws of one State can not discharge the contracts of citizens of other States, because they have no extra-territorial operation and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice can not be given, and consequently there can be no obligation to appear, and of course there can be no legal default. The judgment of the Circuit Court is therefore affirmed with costs accordingly.

SEC. 18. Next in order of the powers conferred upon Congress is the one "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; and to provide for the punishment of counterfeiting the securities and current coin of the United States."

The powers, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those notes or bills the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty in Europe and America at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective Constitu-

tions, had and have as sovereigns a power of issuing paper money and of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue on England, without his license, of notes purporting to be public paper money of Hungary.[1] The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been in existence in America among the several colonies and States, and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender.[2] On this point Justice Strong in the Legal Tender Cases rightly observed: "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is therefore assumed with reference to that power."

It is now settled beyond question that Congress has the exclusive power to incorporate national banks. It is also beyond question settled that the national banks, for their own profit as well as for the use of the govern-

[1] Austria v. Day, 2 Giff. 628, and 3 D. F. v. T. 217.
[2] Juilliard v. Greenman, 110 U. S. 421.

ment in its money transactions, may issue bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which when so current the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of tender.[1] The reason of this understanding is, in the language of Justice Johnson, "that power over the currency of the country, the framers of the Constitution evidently intended to give to Congress alone."

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it can not be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any note not issued under its own authority. Without this power, indeed, its attempt to secure a sound and uniform currency for the country must be futile.[2]

Sec. 19. The power of Congress to fix the "standard" of weights and measures is exclusive. There could be no "standard" if this were questioned. But when there

[1] U. S. Bank v. Bank of Georgia, 10 Wheat. 316.
[2] 8 Wall. 549, 101 U. S. 6.

was no act of Congress, as in the case of Weaver v. Fegely, on the question of how many pounds should make a ton, State statute is constitutional and valid, as was that of Pennsylvania. In this case Judge Lewis said, among other things: "But it seems to be the thought, by the plaintiff in error, that the mere grant of this power to Congress, although not exercised by that body, extinguishes it in the States. This is contrary to the rule of construction adopted by all approved authorities. Alexander Hamilton, who was not likely to relinquish Federal authority where he could maintain it with any show of reason, states the rule thus: 'This exclusive delegation or rather this alienation of the State sovereignty, exists only in three cases: 1st, where the Constitution in express terms granted an exclusive authority to the Union; 2d, where it granted an authority to the Union and at the same time prohibited States from exercising the like authority; 3d, where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant.' It is not pretended that the grant of the power to regulate weights and measures is exclusive in express terms nor that the States are expressly prohibited from exercising it. The State sovereignties are therefore to be extinguished, as regards this subject, if at all, by mere implication. But implication can only

arise where the State authority is absolutely and totally contradictory and repugnant 'to the power delegated to Congress.' These terms necessarily imply the pre-existence of something to contradict or oppose. But there is nothing whatever either in the Constitution or in the act of Congress, which the act of assembly in any respect contravenes or opposes. It is therefore perfectly constitutional." The true rule in this respect was correctly stated by Chief Justice Tilghman;[1] "where the authority of the States is taken away by implication, they may continue to act until the United States exercise their power, because, until such exercise, there can be no incompatibility." The decision of the Supreme Court of Pennsylvania, in the case referred to, was affirmed in the Supreme Court of the United States.

In every State of the Union weights and measures have been constantly governed either by a standard established by a State statute, or by the common law of the State. The power of each State to establish its own common law on this subject has never been denied. Their right to do so, until Congress shall act on the subject, admits of no doubt.[2]

Sec. 20. Now as to counterfeiting, we have heretofore reached the understanding that the power of coining money and of regulating its value was delegated to Con-

[1] Moore v. Houston, 3 S. & R. 178.
[2] Weaver v. Fegely, 29 Penn. State. 27.

gress by the Constitution for the very purpose of creating and preserving the uniformity and purity of such a standard of value. We have also concluded that that power of Congress is so understood on account of the impossibility, which was foreseen, of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. Thus the specific power "to coin money" was given to Congress, founded upon public necessity. Then we can at once see that that power must carry with it the co-related power of "protecting the creature and object" of it.

It is nonsense to suppose for one moment that this high and exclusive authority of Congress, and the power to secure the objects in question would be disputed.

One Marigold was charged with having brought into the United States from a foreign place certain counterfeit coin in violation of Section 20 of the Act of Congress of March 3, 1826, entitled "An act more effectually to provide for the punishment of certain crimes against the United States." The defendant having demurred to the indictment, the judge certified a division of opinion as follows: "First, whether Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to bringing into the

United States counterfeit coins; secondly, whether Congress under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing and selling of the counterfeit coins therein specified." The question was brought up to the United States Supreme Court. Justice Daniel, delivering the opinion of the court, said: "If the medium which the government was authorized to create and establish could be immediately expelled and one substituted that it had neither created, estimated nor authorized—one possessing no intrinsic value—then the power conferred by the Constitution would be useless, wholly fruitless of every end it was designed to accomplish.

"We admit that the clause of the Constitution authorizing Congress to provide for the punishment of counterfeiting the securities and current coin of the United States does not embrace within its language the offence of uttering or circulating spurious or counterfeited coin (the term 'counterfeit,' both by its etymology and common acceptance, signifying the fabrication of a false image or representation); nor do we think it necessary or regular to seek the foundation of the offence of circulating spurious coin, or for the origin of the right to punish that offence, either in the section of the statute before quoted, or in the clause of the Constitution. We trace both the offence and the authority to punish it to the power given

by the Constitution to coin the money, and to the corresponding and necessary power and obligation to protect and to preserve the purity of this constitutional currency for the benefit of the nation.

"We therefore order it to be certified to the Circuit Court of the United States for the Northern district of New York, in answer to the questions propounded by that court:

"1. That Congress had power and authority, under the Constitution, to enact so much of the twentieth section of the act of March 3, 1826, entitled 'An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,' as relates to bringing into the United States counterfeit coins;

"2. That Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to the utterance, publishing, passing and selling of the counterfeit coin therein specified."[1]

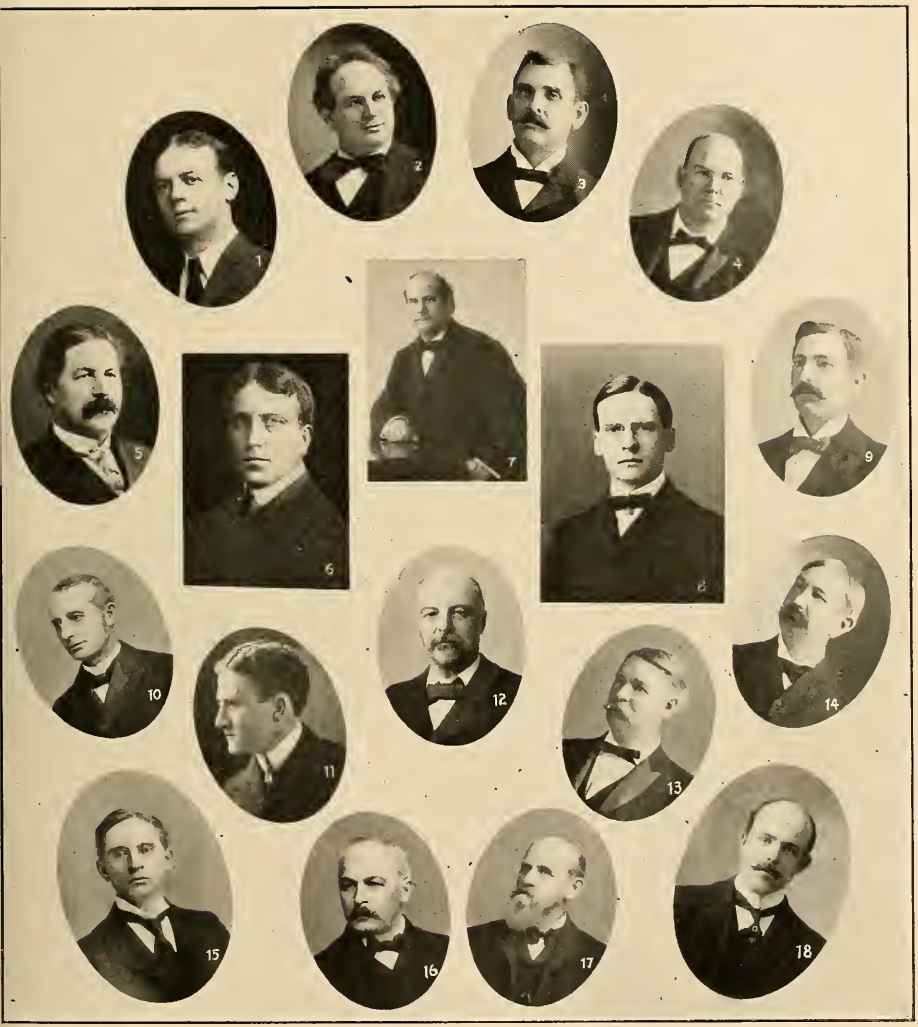
SEC. 21. The direct power given to Congress to enact the laws in organizing, managing and controlling the post offices and post roads of the United States, has never been the subject of question because of the express power given by the seventh clause of Section 8, Article I, of the Constitution. But we are aware that the incidental powers have often been a question of controversy.

[1] U. S. v. Marigold, 9 How. 560. 18 Curtis 261. Fox v. The State of Ohio, 5 How. 410.

Every road within a State or Territory, including railroads, canals, turnpikes and navigable waters, existing or created within a State by the national legislation, becomes a post road.[1] In *ex parte* Jackson, it was held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other right of the people, but to refuse the facilities for distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden.[2]

SEC. 22. *In re* Rapier case, Chief Justice Fuller clearly expressed the criterion of the incidental power. The distinguished jurist said: "The States before the Union was formed could establish post offices and post roads and in doing so could bring into play the police power in the protection of their citizens from the use of the means provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post offices and post roads was surrendered to Congress it was a complete power and the grant carried with it the

[1] Clinton Bridge, 10 Wall. 454.
[2] Ex parte Jackson, 96 U. S. 727.



SOME MEMBERS OF THE HOUSE OF REPRESENTATIVES, FIFTY-NINTH CONGRESS

Some Members of the House of Representatives of the United States, 59th Congress, 1st Session

1. George S. Legare, the United States Representative from South Carolina, was educated in the Porter Academy of Charleston and the University of South Carolina and is a graduate of the Georgetown University, Washington, D. C.
2. Julius Kahn, the United States Representative from California, was a member of the State Legislature. He was educated in the public schools of San Francisco.
3. Sydney Emanuel Mudd, the United States Representative from Maryland, was president of the State House of Delegates. He was educated in St. John's College, the University of Virginia, and Georgetown University, at Washington, D. C.
4. James Carson Needham, the United States Representative from California, was a State Senator. He is a graduate of the University of the Pacific, and the Michigan University.
5. Llewellyn Powers, the United States Representative from Maine, was twice Governor of the State and is a graduate of the Ricker Classical Institute, the University of Albany and Colby University.
6. William Randolph Hearst, the United States Representative from New York, was educated in the public schools of San Francisco and Harvard University.
7. William Jennings Bryan, ex-United States Representative, was a candidate for the Presidency of the United States. He was educated in the Illinois College.
8. Joseph R. Knowland, the United States Representative from California, was chairman of the San Francisco Police Investigating Committee of the State Legislature and was a State Senator. He was educated at the University of the Pacific.
9. Jesse Overstreet, the United States Representative from Indiana, was Secretary of the National Republican Congressional Committee. He was educated in the public schools of Indiana.
10. Eban Wever Martin, the United States Representative from South Dakota, was President of the Board of Education of the City of Deadwood. He was educated in the Michigan University, and is a graduate of the Cornell University.
11. Morris Sheppard, the United States Representative from Texas, was the first president of the Texas Fraternal Congress. He is a graduate of the University of Texas and Yale University.
12. Richard Wagner Parker, the United States Representative from New Jersey, was a member of the House of Assembly of the State, and is a graduate of the Princeton University and also of the Columbia University of New York.
13. Robert W. Miers, ex-United States Representative from Indiana, was the State Circuit Judge and is a graduate of the State University of Indiana, Bloomington, Ind.
14. G. G. Gilbert, the United States Representative from Kentucky was chairman of the Judiciary Committee of the State Senate, and is a graduate of the University of Louisville.
15. Charles Arnette Towne, the United States Representative from New York, was Chairman of the Silver Republican National Committee. He is a graduate of Michigan University.
16. Edgar Dean Crumpacker, the United States Representative from Indiana, was an Appellate Judge in the State. He was educated at the Valparaiso Academy.
17. Elias S. Holliday, the United States Representative from Indiana, is a prominent lawyer in his State.
18. Nicholas Longworth, the United States Representative from Ohio, was a member of the State House of Representatives, and of the State Senate. He is a graduate of Harvard University and also the Cincinnati Law School.

right to exercise all the powers which made that power effective. The argument that there is a distinction between *mala prohibita* and *mala in se,* and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se,* including murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but can not do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners since it would be for Congress to determine what are within and what are without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses. We can not regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declined to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless

Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the government agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."[1]

SEC. 23. Congress is further empowered "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Within the meaning and intent of this express power given to Congress are granted copyrights and patents to the inventors, authors, designers, or proprietors of books, maps, charts, pictures, prints, statues, models, and all other rights pertaining thereto. The laws of civilized countries recognize the power of municipal law to create property out of abstract things. It is this property, not choses, but things in possession, that are called copyrights and patents. Under the common law of Great Britain the specie of property in literary labor or ideas of men were jealously protected, but when such interest and rights were published, the common law protection ceased and the parliamentary provisions substituted in their full extent, although we are aware of the great case

[1] *In re* Rapier, 143 U. S. 110.

of Miller v. Taylor, which was decided in favor of the common law right before the statute.[1] Let us reproduce a few authorities which settled the common law protection in reference to the statutory provisions. Lord Kenyon pointed out in saying that "All arguments in the support of the rights of learned men in their works must ever be heard with great favor by men of liberal minds to whom they are addressed."[2] It was probably on that account that when the great question of literary property was discussed, some judges of enlightened understanding went the length of maintaining that the right of publication rested exclusively with the authors and those who claimed under them for all time; but other opinion finally prevailed, which established that the right was confined to the times limited by the act of Parliament. Lord Ellenborough, on this point, also remarked:[3] "It has been said that the statute of 8 Anne has three objects, but I can not subdivide the first two; I think it has only two. The counsel for the plaintiff contended that there was no right of common law, and perhaps there might not be, but of that we have not particularly anything to do." Thus the law in England is well settled since the statute of 8 Anne.

[1] Miller v. Taylor, 4 Barr 2303.
[2] 27 Term Rep., 627.
[3] 1 University of Cambridge v. Bryer, 16 East, 319.

The literary property of an author in his works can only be asserted under the statute. But, in the language of Justice McLean, "If the common law right of an author were shown to exist in England, does the same right exist and to the same extent, in this country?" It is clear there can be no common law of the United States. The Federal government is composed of sovereign and independent States; each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution of laws of the Union. The common law could be made a part of our Federal system, only by legislative adoption.

No one can deny that when the legislature is about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law. This principle is familiar as regards patent rights and it is the same in relation to the copyright of a book.[1]

SEC. 24. So far as we are able to understand the specific power of Congress under consideration, let us take up the same in its application to the reserved right of the

[1] Wheaton v. Peters, 8 Pet. 591. 11 Curtis 223.

States. In doing so, we will be at once confronted by the legal wall erected by the great decision of the United States Supreme Court in the case of Patterson v. Kentucky. In getting over the wall we can see almost every thing we want.[1] The specific offence charged in the indictment was that the plaintiff in error had sold, within the State, to one Davis, an oil known as the Aurora oil, the casks containing it having been previously branded by an authorized inspector with the words "unsafe for illuminating purposes." That particular oil is the same for which, in 1867, letters patent were granted to Henry C. DeWitt, of whom the plaintiff in error is assignee, by assignment duly recorded as required by the laws of the United States. Upon the trial of the case it was agreed that the Aurora oil could not, by any chemical combination described in the patent, be made to conform to the standard or test required by the Kentucky statute as a prerequisite to the right, within that State, to sell or to offer for sale illuminating oil of the kind designated. The plaintiff in error, as assignee of the patent, in asserting the right to sell the Aurora oil in any part of the United States, claims that no State could, consistently with the Federal Constitution and the laws of Congress, prevent or abstract the exercise of that right, either by express words of prohibition or by regulations, pre-

[1] Patterson v. Kentucky, 97 U. S. 501.

scribed tests to which the patented article could not be made to conform.

For this great and important case the Supreme Court decided that the construction of the Constitution and laws of the United States, made by the plaintiff in error is inadmissible. Justice Harlan, the great constitutional expounder of the day, rendering the opinion of the court, said: "Congress is given power to promote the progress of science and the useful arts. To that end it may, by all necessary and proper laws, secure to inventors, for limited times, the exclusive right to their inventions. That power has been exercised in the various statutes prescribing the terms and conditions upon which letters patent may be obtained. It is true that letters patent, pursuing the words of the statute, do, in terms, grant to the inventors, his heirs and assigns, the exclusive right to make, use and vend to others his invention or discovery, throughout the United States and the territories thereof. But obviously, this right is not granted or secured, without reference to the general powers which the several States of the Union unquestionably possess over their purely domestic affairs, whether by internal commerce or of police. In the American constitutional system, says Mr. Cooley, the power to establish the ordinary regulations of policy has been left with the individual States and can not be assumed by the national

government. (Cooley, Const. Lim. 574.) While it is very difficult to make the precise boundaries of that power or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of which power in the States has been uniformly recognized in this court."

By the settled doctrine of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily entrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued is wise or unwise, it is not the province of the national authority to determine.

The Kentucky statute being, then, an ordinary police regulation for the government of those engaged in the internal commerce of that State, the only remaining ques-

tion is, whether, under the operation of the Federal Constitution and the laws of Congress, it is without effect in cases where the oil, although condemned by the State as unsafe for illuminating purposes, has been made and prepared for sale in accordance with a discovery of which letters patent have been granted. We are of the opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patents discovered, must be exercised in subordination to the police regulations which the State established by the statute of 1874. The right of property in the physical substance, which is the fruit of discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plates by which copies of a map are multiplied, is distinct from the copyright of the map itself. The right to sell the Aurora oil was not derived from the letters patent but it existed and could have been exercised before they were issued, unless it was prohibited by valid local legislation. All which they primarily secure is the exclusive right in the discovery. That is an incorporeal right, a property in motion, having no corporeal tangible substance.[1] Its enjoyment may be secured and protected by national authority against all interference, but the use of the tangible property which

[1] Miller v. Taylor, 4 Barr 2396.

comes into existence by the application of the discovery is not beyond the control of State legislation, simply because the patentee acquires a monopoly in his discovery. The distinguished constitutional authority cited to say, which citation in its conclusion emphasizes: "A person might with as much propriety claim a right to commit murder with an instrument, because he held a patent for it as a new and useful invention."[1]

SEC. 25. The power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations" is conferred upon Congress by the Constitution.

Congress thereupon enacted, in pursuance to the Constitution, the law which says that "robbery and murder committed on the high seas shall be deemed piracy."[2] It further provided in a separate act that "If any person or persons whatsoever, shall upon the high seas, commit the crime of piracy, as defined by the laws of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, etc., be punished with death."[3] In application of these letters of statutes the series of contest and contention has hitherto been made. One of the most discussed is that Congress is bound to

[1] Vanini *et al* v. Paine *et al.* (Del.) 65.
[2] 1 Stats, at Large 113.
[3] Stats. at Large 513.

define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. When this question of the specific power was brought before the supreme tribunal of the land in the case of *The Irresistible* Justice Story in rendering the opinion of the court said: "The power given to Congress is not merely to define and punish piracies; if it were, the words 'to define' would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. But the power is also given 'to define and punish felonies on the high seas, and offences against the law of nations.' The term 'felonies' has been supposed not to have a very exact and determinate meaning in relation to offences of the common law committed within the body of a county. However this may be, in relation to offences on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisdiction of the admiralty in the technical sense of the common law. Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations."

But supposing Congress were bound in all cases to define the offence, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts

constituting the offence. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. In respect to murder, where "malice aforethought" is of the essence of the offence even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" should remain to be gathered from the common law. There would then be no end to our difficulties, for each would involve some term which might still require some new explanation.

Next the most important feature of the subject under our consideration is whether the crime of piracy is defined by the law of nations with reasonable certainty. Every writer on the law of nations alludes to piracy as a crime of a settled and determinate nature. All writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi* is piracy.[1] English common law also recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations which is part of the common law, as an offence against the universal law of society, a pirate being deemed an enemy of the human race.[2]

[1] Am. and Eng. Enc. of Law, 18, p. 461; Hall's Int. Nat. Law, p. 169; Taylor's Int. Nat. Pub. Law, p. 234.
[2] Rex v. Dawson, 5 State Trial; Hawk P. C. c. 37, 3, 2.

Whatever may be the diversity of definitions in other respects, the writers on the common law, or the maritime law, or the law of nations, all treat the question in the same way, agreeing that piracy is an offence against the law of nations, and that its true definition, by that law, is robbery upon the sea.[1]

The opinion of the Supreme Court in the case of *The Irresistible,* was delivered by Justice Story who, in conclusion, said: "The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment, and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority or deriving protection from the flag or commission of any government. If under such circumstances the offence be not piracy, it is difficult to conceive of any which would more completely fit the definition."

Sec. 26. Before concluding the specific power given, we have so far understood there remains one other question, viz.: What is the "high seas," within the meaning of the Constitution, the unwritten understanding of which must be equally important if not more so.

Spaniards, during the 16th century, asserted the right to exclude all others from the Pacific Ocean. So did the

[1] Inst. 112, 4 Bl. Comm. 73.

Portuguese, under the grant of Pope Alexander VI, the exclusive use of the Atlantic Ocean, West and South of the designated line. The English, too, in the 17th century, claimed the exclusive right to navigate the seas surrounding Great Britain.[1] "The sea is that which lies within the body of a county, or without"; says Sir Matthew Hale, "That arm or branch of the sea which lies within the *fauces terrea*, where a man can reasonably discern between shore and shore, is, or at least may be, within the body of the county, and therefore within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." By the "main sea" Hale here means the same thing expressed by the term "high sea," *"mare altum"* or *"le haut meer."*[2] The United States Supreme Court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II and Henry IV, "that high seas mean that portion of the sea which washes the open coast."[3]

Justice Field delivered the opinion of the Supreme Court on this "high sea" question, stating: "If there were no seas other than the ocean, the term 'high seas' would be limited to the open, unenclosed waters of the ocean, but

[1] United States v. Rodgers, 150 U. S. 249. Woosley, Int. Law, Sec. 55.
[2] De Jure Maxis, C. IV.
[3] Waring v. Clark, 5 How. 441.

as there are other seas besides the ocean there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens and to provide for offences on vessels navigating those waters and for collisions between them. The term 'high seas' does not, in either case, indicate any separate and distinct body of water, but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast."

In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Seas, both of which are inland seas, finding their way to the ocean by a narrow and distinct channel. Indeed whenever there are seas, free to the navigation of all nations and people on their borders, their open waters outside of the portion "surrounded or enclosed between narrow headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county," as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine character.[1]

[1] U. S. v. Rodgers, 150 U. S. 249. Genesee Chief case, 12 How. 443. Ill. Cent. R. R. Co. v. Ill., 146 U. S. 387.

SEC. 27. Justice Field, in considering the term "high" of the high sea, remarked: "It is to be observed also that the term 'high' in one of its significations is used to denote that which is common, open and public. Thus every road, or way, or navigable river which is used freely by the public is a 'high' way. So a large body of navigable water other than a river which is an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of high seas within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean."[1]

SEC. 28. According to the Constitution Congress alone has the power "to declare war, grant letters of marque and reprisals, and make rules concerning capture on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces."[2]

[1] U. S. v. Rodgers, 150 U. S. 249.
[2] Const., Art. 8, cl. 11, 12, 13, 14.

When differences between States reach a point at which both parties resort to force, or one of them does an act of violence which the other chooses to look upon as a breach of peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant.[1] And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral."[2] It is none the less a war on that account for war may exist without a declaration on either side. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other. The battle of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized "a state of war existing by the act of the Republic of Mexico." Similar was the act of Congress with regard to the Spanish American War. These acts not only provided for the future prosecution of the war, but were themselves the vindications and ratifications of the acts of the presidents of respective periods, in accepting the challenge without previous formal declarations of war by Congress. The Supreme Court of the United States, in the prize

[1] Had. Int. Law, 15 Chap. III.
[2] Prize cases, 2 Black, 635.

SOME MEMBERS OF THE UNITED STATES SENATE, FIFTY-NINTH CONGRESS

Some Members of the United States Senate in the 59th Congress, 1st Session

1. George Peabody Whetmore, the United States Senator from Rhode Island, was twice Governor of the State and is a graduate of Yale and Columbia Universities.

2. Julius C. Burrows, the United States Senator from Michigan, was twice elected Speaker *pro tempore* of the House of Representatives.

3. Fred T. Dubois, the United States Senator from Idaho, was the last Delegate from the Territory of Idaho, and is a graduate of Yale University.

4. William Joel Stone, the United States Senator from Missouri, was Governor of the State and is a graduate of the Missouri University.

5. Anselm Joseph McLaurin, the United States Senator from Mississippi, was Governor of his State. He was also delegate to the Constitutional Convention in 1890.

6. Joseph H. Millard, the United States Senator from Nebraska, was Mayor of Omaha and is also a prominent banker.

7. Jacob H. Gallinger, the United States Senator from New Hampshire, was President of the State Senate and is an alumnus of the Dartmouth College.

8. Benjamin Ryan Tillman, the United States Senator from South Carolina, was twice Governor of the State.

9. Stephen Russell Mallory, the United States Senator from Florida, was Representative from his State and is a graduate of the Georgetown University of Washington, D. C.

10. Francis Emory Warren, the United States Senator from Wyoming, was President of the State Senate, and he also was the first Governor of the State.

11. Albert J. Beveridge, the United States Senator from Indiana, is a graduate of the De Pauw University.

12. Charles Dick, the United States Senator from Ohio, was a United States Representative from his State. He is the successor of Marcus A. Hanna.

13. Chester I. Long, the United States Senator from Kansas, was the United States Representative from his State.

14. Joseph Benson Foraker, the United States Senator from Ohio, was Judge of the Superior Court of Cincinnati and he was twice Governor of the State.

15. William Pierce Frye, the United States Senator from Maine, was Attorney General of the State. He was President *pro tempore* of the United States Senate, and was also a Peace Commissioner for the Spanish-American War. He is an alumnus of Bowdoin and Bates Colleges.

cases, in rendering the decision whether or not the lawfulness of seizures and condemnations as prizes of vessels violating the blockade of Southern ports under President Lincoln's promulgation, said most vital things.

Justice Grier who delivered the court's opinion said: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local, unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact. Objection made to this act of ratification, that it is *ex post facto,* and therefore unconstitutional and void, might possibly have some weight on the indictment in a criminal court. But the precedents from that source can not be received as authoritative in a tribunal administering public and international law."[1]

Sec. 29. Constitution declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;" and also "to provide for organiz-

[1] The Prize Case, 2 Black. 635.

ing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States."[1] In pursuance of this authority, the act of 1795 has provided "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper."

In the case of Martin v. Mott, the provisions of the act of 1795 has not been denied that it is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. Justice Story in delivering the opinion of the court, said that there is no ground for doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the

[1] U. S. Const., Art. VIII, el. 15, 16.

requisite force for action before the invader himself has reached the soil.

Naturally, free people are jealous of the exercise of military power. But American people all understood such power conferred on the President is and shall be limited power confined to cases of actual invasion, or of imminent danger of invasion. This limited power has become hitherto a question such as this: Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question? May every officer and every soldier to whom the orders of the President are addressed, decide to refuse or obey such orders?

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, . . . it shall be lawful for the President, . . . to call forth such number of the militia, . . . as he may judge necessary to repel such invasion." The power itself is confined to the executive of the Union, to him who is, by the Constitution, the commander in chief of the militia, when called into the actual service of the United States, "whose duty it is 'to take care that the laws be faithfully executed,'" and whose responsibility for an honest discharge of his official obligations is se-

cured by the highest sanction. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it can not therefore be correct inference that any other person has a right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, it is to be exercised by him upon his own opinion of certain facts. In the present case we are all of the opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the executive must be presumed

to possess of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.[1]

[1] Martin v. Mott, 12 Wheat. 19, 7 Curtis 10.

THE PRESIDENT

THE WHITE HOUSE

THE PRESIDENT

ARTICLE III.

"The executive power shall be vested in a President of the United States of America."—*Art. II, Sec.* 1, *U. S. Constitution.*

SECTION 30. The constitutional provision created the office of the President of the United States. It vested at the same instance the entire executive power in a single individual. The head of the executive of the American nation "shall hold his office during the term of four years and together with the Vice-President, chosen for the same term."

President and Vice-President must be "a natural born citizen or a citizen of the United States, who has attained the age of thirty-five years"; and a naturalized citizen shall be ineligible to that office. The President of the United States, the strictest creature of the constitutional nomenclature, is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subject to censure; if

necessary, to punishment. He is a dignified but accountable magistrate of a free and great people. The tenure of his office, it is true, is not hereditary; nor is it for life; but still it is a tenure of the noblest kind; by being a man of the people, he is invested; by continuing to be a man of the people, his investiture will be voluntarily and cheerfully and honorably renewed.[1]

But, as to the investiture of renewal, there is a time-honored precedent, philosophised to it the unwritten understanding of the Presidential constitution. This precedent was set forth by George Washington, the first President. To quote his own language: "The period for a new election of a citizen to administer the executive government of the United States being not far distant, and the time actually arrived when your thoughts must be employed in designating the person who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distinct expression of the public virtue, that I should now appraise you of the resolution I have formed to decline being considered among the members of those out of whom a choice is to be made.

"The acceptance of, and continuance hitherto in, the office to which your suffrages have twice called me, have been a uniform sacrifice of inclination to the opinion of duty, and to a deference for what appeared to be your

[1] Wilson's work, 400.

desire. I constantly hoped that it would have been much earlier in my power, consistently with motives which I was not at liberty to disregard, to return to that retirement from which I had been reluctantly drawn. The strength of my inclination to do this, previous to the last election, had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our affairs with foreign nations and unanimous advice of persons entitled to my confidence impelled me to abandon the idea."[1]

The American Constitution is silent as to the eligibility of women for the office of President. As the letters of the constitutional provisions stand, the masculine pronoun "he," representing the President, indicates that the person of presidential eligibility may be of the male line, otherwise, the feminine President may become the matter of possibility. There are some among the American women who are advancing from a grade of development where they were only capable of loving and serving their own immediate relations, to a grade where they really care about their city, State, and country. They seem to realize that the world's mothers must not only bear and rear good and healthy sons and daughters, but must help and make good and healthy, all the sons and daughters of mankind.

[1] Washington's Farwell Address.

In the United States, in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the office the same shall devolve on the Vice-President, and the Congress by by-laws provides for the case of both President and Vice-President, declaring what officer shall then act as President until the disability be removed, or a President shall be elected. When the President is elected he shall before entering upon the duties of his office take an oath, declaring "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

SEC. 31. Under the Constitution, the President is the commander-in-chief of the army and navy of the United States, and the militia of the several States when they are called into actual service of the United States. Standing alone, the constitutional provision invested in the President the final and supreme power to declare martial law, confiscate and condemn or forfeit what belongs to beligerents and enemies. In the same constitutional provision the President is empowered to require the opinion, in writing, of the principal officer or head in each of the executive departments, upon any subject relating to the duties of their respective offices. In the United States the President may, according to usages and customs,

call the principal officer or commonly called Secretary of each department, together to carry on the important affairs of the executive, which gathering is also called a Cabinet Meeting. However, the understanding of the American cabinet, the powers and duties of its members, is apparently different from that under King or Emperor. The cabinet members are the mere executive agents and any official act done by them or one of them in the legal contemplation is done by the President, and the responsibility is, not upon the cabinet members, but upon the President himself.

Sec. 32. The responsibility of the executive is for the people to institute against. The Constitution and laws made in pursuance to the Constitution will enact such responsibility. The Constitution declares that the President, Vice-President and all civil officers of the United States are liable to the processes of removal and punishment; and invested in the House of Representatives the sole power of impeachment, and in the Senate the sole power to try its presentments. When the President is tried the Chief Justice of the Supreme Court shall preside. President Johnson was acquitted by one less vote than the concurrence of two-thirds of the members. Judgment in case of impeachment shall not extend further than to the removal from office and disqualification to hold and enjoy any office of honor, trust or

profit under the United States. But the party convicted shall nevertheless be liable, and subject to indictment, trial, judgment and punishment according to law. As to the words "civil officers" in the constitutional provision, they may be construed as all officers who hold their office under the national government, irrespective of the department, but it rests with the Senate, as a court of last resort, to decide who are included within that designation. The President's power to grant reprieves and pardons does not extend to impeachment.

SEC. 33. The Constitution empowers the President to grant reprieves and pardons for offences against the United States except in cases of impeachment. Under this power the President has granted reprieves and pardons since the beginning of the American government. No statute has ever been passed regulating it in cases of conviction by the civil authority; the President has exercised the specific power in such cases.

The word "pardon" does not mean either in the common parlance or in the legal contemplation an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed. It means, in the language of Justice Wayne, "forgiveness, release, remission. Forgiveness for an offence, whether it be one for which the person committing it is liable in the law or otherwise. Release from pecuniary obligation,

as where it is said, I pardon you your debt, or it is the remission of a penalty to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty as money has been incurred, and it is remitted by a public functionary having power to remit it. In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is."[1]

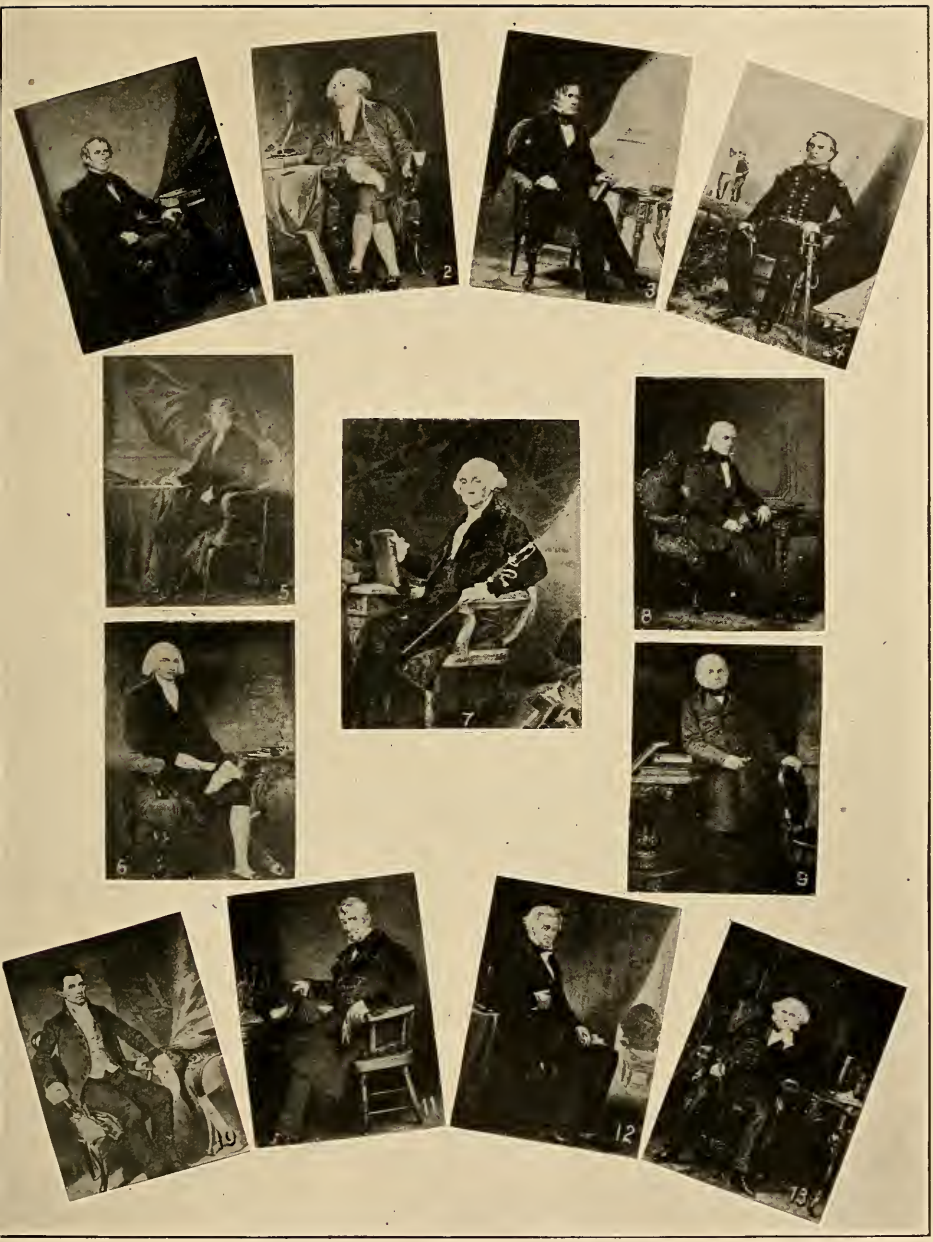
It was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when the Supreme Court instructed Chief Justice Marshall to say "that the power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial instructions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[2] The understanding of this construction has ever since been accepted and the important cases which followed it embodied the same philosophy of it.[3]

Pardon is said by Lord Coke to be a work of mercy,

[1] Ex parte Wells, 18 How. 307.
[2] U. S. v. Wilson, 7 Pet. 162.
[3] Cathcart v. Robinson, 5 Pet. 264.

whereby the King either before, attainds sentence or conviction, or after, forgiving any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical; the King's coronation oath is, "that he will cause justice to be executed in mercy." It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which validity of the pardon will depend. And if the felon does not perform the condition of the pardon, it will be altogether void; and he many be brought to the bar and made to suffer the punishment to which he was originally sentenced. But in the meantime we must make it understood that the King cannot, by any previous license, make an offence dispunishable which is *malum in se,* that is, unlawful itself as being against the law of nature, common good, common law, reason and public good.

"This power to pardon," says the Supreme Court, "has also been restrained by particular statutes. By the Act of Settlement, 12 and 13 Will. III c. 2, Eng., no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament, but after the articles of impeachment have been heard and determined, he may pardon. The provision in our Constitution, except in cases of impeachment out of the power of the President to



PRESIDENTS OF THE UNITED STATES

1. JOHN TYLER, 10th Pres.
2. JOHN ADAMS, 2d Pres.
3. FRANKLIN PIERCE, 14th Pres.
4. ZACHARY TAYLOR, 12th Pres.
5. THOMAS JEFFERSON, 3rd Pres.
6. JAMES MADISON, 4th Pres.
7. GEORGE WASHINGTON, 1st Pres.
8. JAMES K. POLK, 11th Pres.
9. JOHN QUINCY ADAMS, 6th Pres.
10. JAMES MONROE, 5th Pres.
11. WILLIAM HENRY HARRISON, 9th Pres.
12. ANDREW JACKSON, 7th Pres.
13. MARTIN VAN BUREN, 8th Pres.

pardon, was evidently taken from that statute, and is an improvement upon the same."[1]

As to the reprieves, the same court makes us to understand that that is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender may require it, but it extends also to cases *ex necessitate legis,* as where a female after conviction is found to be *enceinte,* or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used to determine either of the two just mentioned, are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve.

In conclusion of the specific power of the President to grant pardon we herein cite the philosophy of the unwritten understanding of it, in quoting the language of Justice Field: "It extends to every office known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to the legislatures' control. Congress can neither limit the effect of his pardon, nor

[1] Ex parte Wells, 11 Howard 307.

exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him can not be fetted by any legislative restriction. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities which follow conviction; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him as it were, a new man, and gives him new credit and capacity. There is only this limitation to its operation, it does not restore offices forfeited, or property or interest vested in others in consequence of the conviction and judgment."[1]

Sec. 34. The President of the United States is also empowered by the Constitution, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.

As was said by Chief Justice Marshall (*The Peggy* 1 Cranch. 103, 110): "Where a treaty is the law of the

[1] Ex parte Garland, 4 Wall. 333. 4 Bl. Com. 402. 6 Bacon's Abrig., tit. Pardon. Hawkins, Book 2, c. 37, 34 and 54.

land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the courts as an act of Congress." And in Whitney v. Robertson (124 U. S. 190): "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing." To the same effect are the Cherokee Tobacco (11 Wall. 616) and the Head Money cases (112 U. S. 580).

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in American Ins. Co. v. Canter (1 Pet. 511, 542): "The Constitution confers absolutely upon the government of the Union the powers of making war and of making treaties; consequently that government possesses the pow-

er of acquiring territory, either by conquest or by treaty." The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.

It follows from this that by the ratification of the treaty of Paris the island became the territory of the United States—although not an organized territory in the technical sense of the word.

It is true Mr. Chief Justice Taney held in Scott v. Sanford (19 How. 393), that the territorial clause of the Constitution was confined, and intended to be confined, to the territory which at that time belonged to or was claimed by the United States, and was within their boundaries, as settled by the treaty with Great Britain; and was not intended to apply to territory subsequently acquired. He seemed to differ in this construction from Chief Justice Marshall in the American, etc., Ins. Co. v. Canter (1 Pet. 511, 542) who, in speaking of Florida before it became a State, remarked that it continued to be a territory of the United States, governed by the territorial clause of the Constitution.

But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief

Justice Taney in the Dred Scott case. In the more recent case of the National Bank v. County of Yankton, (101 U. S. 129), it was said by Mr. Chief Justice Waite that Congress "has full and complete legislative authority over the people of the territories and all of the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States." Indeed, it is scarcely too much to say that there has not been a session of Congress since the Territory of Louisiana was purchased that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the States to act upon the subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a State upon an equality with other States; it may sell its public lands to individual citizens or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress.[1]

[1] The Insular Tariff Cases.

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates without the aid of any legislative provision. But when the terms of the stipulation import a contract, that is when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.[1]

Viewing the treaty, which operates with regard to the individual rights, Justice Davis, in the case of Haver v. Yaker, said that in this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so before it becomes a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate is not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen on whose rights of property it op-

[1] Foster v. Neilson, 2 Pet. 253.

erates, has no means of knowing anything of it while before the Senate, it would be wrong in principle, to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law so as to make the ratification of the treaty relate back to its signing, would be manifestly unjust, and can not be sanctioned.[1]

SEC. 35. Question as to a conflict between an act of Congress, and a treaty in force when the act was passed; the act of Congress must prevail in a judicial forum.[2] In support of the unwritten understanding of it, Justice Miller, in Head Money cases, had then to say that a treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there is any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which when made, usually suspends or destroys existing treaties between the nations thus at war. In short, we are of the opinion that, so far as a treaty made by the United

[1] Haver v. Yaker, 9 Wallace 32.
[2] Taylor v. Morton, 2 Curtis, 454. Ah Lung, 18 Fed. Rep. 28.

States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal.[1]

Sec. 36. Always keeping in view of the judicial understanding in the case of conflict between the treaty and the act of Congress, let us inquire into what is the understanding with regard to a conflict between the treaty provision and the State statutory provision. "As commercial intercourse increases between different countries," says Justice Field, "the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from allegiance to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. But with these exceptions, it is not perceptible that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[2]

[1] Head Money Cases, 112 U. S. 580.
[2] Geofroy v. Riggs, 133 U. S. 258.

PRESIDENTS OF THE UNITED STATES

1. Rutherford B. Hayes, 19th Pres.
2. Chester A. Arthur, 21st Pres.
3. Benjamin Harrison, 23rd Pres.
4. Abraham Lincoln, 16th Pres.
5. Theodore Roosevelt, 26th Pres.
6. James A. Garfield, 20th Pres.
7. Grover Cleveland, 22d and 24th Pres.
8. William McKinley, 25th Pres.
9. Ulysses S. Grant, 18th Pres.
10. Andrew Johnson, 17th Pres.
11. James Buchanan, 15th Pres.
12. Millard Fillmore, 13th Pres.

When arriving at this understanding of the power of the Federal Government we are naturally confronted with the question as to whether the Federal Government is to control the internal policy of the States, which was often the case since the commencement of this constitutional government.[1]

The Supreme Court of the State of California instructed Judge Heydenfeldt to say when the policy and State statutory provisions were in jeopardy under the treaty, being made by the Federal power. "Now, as by the compact the States are absolutely prohibited from making treaties, if the general government has not the power, then we must admit a lameness and incompleteness in our whole system, which renders us inferior to any other enlightened nation, in the power and ability to advance the prosperity of the people we govern. Mr. Calhoun, in his discourse on the Constitution and government of the United States, has given to this power a full consideration, and I cannot doubt that the view which I have taken is sustained by his reasoning according to his opinion, the following may be classed as the limitations on the treaty making power: First, it is limited strictly to questions *inter alias,* 'all such clearly appertain to it.' Second, 'by all the provisions of the Constitution which prohibit certain acts to be done by the government or any

[1] Opel v. Shoup, 100 Iowa 407. Wunderle v. Wunderle, 144 Ill. 40. Hauenstein v. Lynham, 100 U. S. 483.

of its departments.' Third, 'by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary.' Fourth, 'it can enter into no stipulation calculated to change the character of the government, or to do that which can only be done by the Constitution making power; or which is inconsistent with the nature and structure of the government or the objects for which it was found.' Even if this power was to abrogate to some extent the legislation of the States, we have authority for admitting it, if it does not exceed the limitations which we have cited from the work of Mr. Calhoun, and laid down as the rule to which we yield our assent. I see no danger which can result from yielding to the Federal Government the full extent of the power which it may claim from the plain language, intent and meaning of the grant under consideration, upon some subjects, and the policy of foreign governments would be readily changed upon the principles of mutual concession. This can only be affected by the action of that branch of the States sovereignty known as the general government, and when effected, the State policy must give way to that adopted by the governmental agent for her foreign relations."[1]

SEC. 37. The President is directed to send from time to time such message to Congress or in the language of the

[1] People, ex Rel. The Attorney-General v. Gerke, 5 Cal. 381.

Constitution, "information of the State of the Union." He may on extra occasions convene both Houses or either of them, and in case of disagreement, he may adjourn them to such a time as he thinks proper. Such interferences on the part of the President are justified according to the circumstances of the case. He also has power to veto such bills passed by the two Houses before it shall become a law. When he vetoes a bill he must return it with his objections to the House in which it originated. If the House reconsiders the bill and passes it by two-thirds of that House it shall be sent, together with the objections, to the other House; if again approved by two-thirds of that House it shall become a law over the President's veto. However, any bill shall not be returned by the President within ten days—Sunday excepted—after it shall have been presented to him, it will become a law in like manner as if he had signed it, unless the Congress, by their adjournments, prevents its return. All orders, resolutions, and votes to which the assent of both Houses may be necessary, except on a question of adjournment, must take the course of bills.[1]

Sec. 38. The President has, under the Constitution, power, by and with the advice and consent of the Senate to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other

[1] Art. I, Sec. 7, Cls. 2, 3, Const.

officers of the United States whose appointments are not in the Constitution otherwise provided for, and which shall be established by law; but Congress may by law vest the appointment of such inferior officers in the President alone in the courts of law, or in the heads of the department.

Of all the particular powers that are implied in this provision of the Constitution, the most conspicuous one is that prerogative of the President with regard to the removal of the officer who was appointed in concurrence with the Senate. Alexander Hamilton, in defence for the adoption of the Constitution had advanced the preliminary understanding of this specific prerogative. He says that "it has been mentioned as one of the advantages to be expected from the co-operation of the Senate, the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint." However, after the adoption, Mr. Madison championed the opinion of a decided majority in the first session of the first House of Representatives in 1783 which had not only changed the preliminary understanding of the prerogative but also enlarged it. In Mr. Madison's own language, "Executive should have power of independent removal, whether already derived from the Constitution or to be conferred by supplementary legislation."

The debate arose upon the clause in a pending bill providing that the officer therein named should "be removable by the President." The bill thus passed was sent to the Senate, where it was completed. Madison's declaration then and since then, attaches a great bearing upon the officer of the Executive head, when he said: "I feel the importance of the question, and know that our decision will involve the decision of all similar cases and that the decision that is at this time made will become the prominent exposition of the Constitution."

The specific understanding of the President's prerogative to remove Federal officers without the participation or interference of the Senate, was afterwards authenticated by the Supreme Court of the United States: "No one denied the power of the President and Senate jointly to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."[1] Such is the unwritten understanding of the Constitution, which was, however occasionally disturbed by the circumstances of the age.

[1] Ex Parte Hennen, 13 Pet. 259. Blake v. United States, 103 U. S. 229.

Once in 1867, under President Johnson's administration, and again under that of President Cleveland. The bitter contention between the Senate and President may be better illustrated in quoting the language of Mr. Cleveland: "Within thirty days after the Senate met in December, 1885, the nominations of the persons who had been designated to succeed officials suspended during the vacation, were sent to that body for confirmation pursuant to existing statutes. Very often in the session frequent requests in writing began to issue from the Senate to which these nominations were referred, directed to the heads of the several departments having supervision of the officers to which the nominations related, asking the reason for the suspension of the officers whose places it was proposed to fill by means of the nominations submitted, and for all papers on file in their departments which showed the reason for such suspensions.

"In considering the request made for the transmission of the reasons for suspensions and the papers relating thereto, I could not avoid the conviction that a compliance with such requests would be to that extent a failure to protect and defend the Constitution, as well as a wrong to the great office I held in trust for the people, and which I was bound to transmit unimpaired to my successors, nor could I be unmindful of a tendency in some quarters

to encroach upon executive functions, or of the eagerness with which executive concession would be seized upon as establishing precedence . . .

"Thus was an unpleasant controversy happily followed by an expurgation of the last pretence of statutory sanction to encroachment upon constitutional executive prerogatives, and thus was a time honored interpretation of the Constitution restored to us. The President freed from the Senators claim of tutelage, became again the independent agent of the people, representing a co-ordinate branch of their government, charged with responsibilities which under his oath, he ought not to avoid or divide with others, and invested with powers, not to be surrendered, but to be used under guidance of patriotic intention and an unclouded conscience."[1]

The language of one of the greatest men serves most vital and everlasting consequence for the maintenance of the American constitutional mechanism, "Check and Balance" systems of the government. In the meantime all the Americans understood that prerogative of the President would not include in it power of anticipating a vacancy and appointing an officer for such vacancy; and that in matters arising out of the ministerial duties which is one of the vast and enumerated powers the President is subjected to, if necessary,

[1] Presidential Problems, P. 45-76.

such judicial interferences.[1] And the last and most important of them all is the understanding of the President's cognizance of the prerogative of the Senate; namely, the constitutional power of the Senate to advise and consent, if necessary to restrain the President's appointment of Federal affairs.

This co-operation of the Senate and President, however, has often been subjected to and suggested criticism. They say that it may serve to give the President an undue influence over the Senate or that it may have an opposite tendency. In the United States the political circumstances manifests itself towards totally unlooked for destiny. Nationally as well as individually the American characteristics ever have been and ever will be very peculiar, in that they resist encroachment of any kind. Ambition of one separate and distinct government counteracts ambition of another. It is said that justice is the end of government, and that it is the end of civil society. This is true, but it is also true that the Americans like any other human race, are not angels. If they were, no government would be necessary. In the United States we notice that policy of supplying, by opposite and vital interests, the defects of better motives, which is traceable through the whole system, private or public. And then the electors for choosing the President, as well as

[1] McCrary and Law of Elections, Sec. 237-257. Page v. Hardin, 8 B. Mons. (Ky.) 648. Marbery v. Madison, 1 Cranch. 137.

MEMBERS OF THE CABINET AND HIGH OFFICIALS, ROOSEVELT ADMINISTRATION

Members of the Cabinet and the High Officials with the Roosevelt Administration

1. Frank P. Sargent, of Vermont, U. S. Commissioner General of Immigration, was chief of Brotherhood of Locomotive Firemen, a member of the Industrial Commission, and was educated in the public schools of his State.

2. Ethan Allen Hitchcock, of Missouri, Secretary of the Interior, was the United States Ambassador Extraordinary and Minister Plenipotentiary to Russia. He was educated at the Military Academy in New Haven.

3. Henry Martin Hoyt, Solicitor General of the United States, was Assistant Attorney General of the United States, and is an alumnus of Yale and Pennsylvania Universities.

William Loeb, Jr., of New York, Secretary to President Roosevelt, was Secretary to the New York State Assembly and Senate, to the Governor of New York, and to the Vice-President of the United States. He was educated at the public schools of Albany, New York.

5. Charles Joseph Bonaparte, of Baltimore, Secretary of the Navy, is a prominent member of the Maryland Bar. He is a graduate of Harvard University.

6. Elihu Root, of New York, Secretary of State, was the United States Attorney for the Southern District of New York, a member of the Alaskan Boundary Commission and also Secretary of War. He is a graduate of Hamilton College and the University of the City of New York.

7. William Howard Taft, of Cincinnati, Secretary of War, and President of the American Red Cross, was Assistant Prosecuting Atttorney, then Judge of the Superior Court of Cincinnati. He was sometime Collector of Internal Revenue, Solicitor General of the United States, the United States Circuit Court Judge and the first civil Governor of the Philippine Islands. He is a graduate of Yale University and Cincinnati College.

8. William Henry Moody, of Massachusetts, Attorney General, was District Attorney in Massachusetts, and the United States Representative, and Secretary of the Navy. He is a graduate of Phillips Academy and Harvard University.

9. James Wilson, of Iowa, Secretary of Agriculture, was Speaker of the State House of Assembly, and a United States Representative from his State. He was also a regent of the Iowa State University, and sometime Professor at the Iowa Agricultural College at Ames.

10. Leslie M. Shaw, of Iowa, Secretary of the Treasury, was twice Governor of the State of Iowa. He is a graduate of Cornell University and also the Iowa College of Law.

11. Victor Howard Metcalf, of Oakland, California, Secretary of Commerce and Labor, was the United States Representative from his State. He is a prominent member of the California Bar, and also is a graduate of the Utica Free Academy, Russell's Military Academy, and Yale University, of New Haven.

12. George Bruce Cortelyou, of New York, Postmaster General, was stenographer to President Cleveland, Secretary to President Roosevelt and also to McKinley. He was appointed the first Secretary of Commerce and Labor and also Chairman of the Republican National Committee. He is a graduate of the Georgetown University and Columbian (now George Washington) University of Washington, D. C.

13. Vespasian Warner, United States Commissioner of Pensions, was United States Representative from Illinois. He is a graduate of Harvard University.

14. Martin A. Knapp, of New York, Chairman of the Interstate Commerce Commission, was Corporation Counsel in his State, and Professor of Columbian (now George Washington) University and is a graduate of Wesleyan University.

the State legislature who appoint the Senators have ever since been and ever will be composed of the most enlightened, intelligent, educated and respected citizens. So that those who are entrusted with such confidence and power, possess every consideration that can influence the human mind, such as honor, oath, reputation, conscience, the love of country, family affections and attachments, that afford security for their fidelity.

Conclusive evidence resulting from the experience and development of the separate and distinct powers of the President and the Senate will never be accummulated. We have just grown to be at ease as it could never be able to transform itself into monarchial or aristocratic body, or any other body. But if such revolution would ever happen the House of Representatives with the people on their side who are the only legitimate fountain of power, and who alone are the grantor of the charter, will at any and all times be able to bring back the Constitution to its primitive form.

THE COURTS

THE COURTS

ARTICLE IV.

"The judicial power shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish."—*Art. III, Sec. 1, U. S. Const.*

SEC. 39. The legislative, executive and judicial powers of every well constructed government are co-extensive with each other; that is, they are potentially co-extensive.[1] The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments, which are not extremely defective in their organization, must possess, within themselves, the means of expounding as well as enforcing their own laws. If we examine the Constitution of the United States, we find that its framers kept this great political principle in view. The first article empowers all legislative powers in Congress, the second article vests the whole executive power in the President; and the third article declares, "that the judicial powers of the United States shall be

[1] Osborn v. the Bank of the United States, 9 Wheaton 738.

vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of law.[1]

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political right of the Constitution; because it will be least in capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community; the legislative not only commands the purse, but it

[1] No. LXXVIII Federalist.

prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.

It is further said that the judiciary is next to nothing; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter as long as the judiciary remains truly distinct from both the legislature and executive. In the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that, as all the effects of such an union must ensue from a dependance of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being over-powered, awed or influenced by its co-ordinate branches; that, as nothing can

contribute so much to its fairness and independence as permanency in office; this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution, and in a great measure, as the *citadel* of the public justice and the public security.

SEC. 40. The judicial power of the United States shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between citizens of different States, between citizens of the same State, claiming lands under grants of different States, and between a State, or citizens thereof, and foreign States, citizens, or subjects.[1]

By this constitutional declaration the judicial department receives jurisdiction, when any question respecting any of the clauses shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the judicial power shall extend to all cases, as declared by the Constitution.

[1] Art. III, Sec. 2, U. S. Const.

CHIEF JUSTICE MARSHALL

A suit was brought in the Circuit Court of the United States for Ohio by the bank of the United States, to restrain Osborn and others, officers of the State of Ohio, from collecting a State tax on the bank. A decree was rendered against the State officers, who appealed to the Supreme Court of the United States. In the Supreme Court the respondents re-argued that the case was constitutionally within the National judiciary as it has arisen under the law of the United States, and the appellants contended that it was not, because several questions may arise in it which depend on the general principles of the law, not on any act of Congress.

The Supreme Court affirmed the decree of the circuit court, and the opinion was delivered by Chief Justice Marshall.[1] The celebrated jurist, in his opinion expounding the constitutional grant of jurisdiction, said: "If this were sufficient to withdraw a case from the jurisdiction of the Federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the Constitution relating to a subject of vital importance to the Government, and expressed in the most comprehensive terms, would be construed to mean almost nothing."

There is scarcely any case, every part of which depends on the Constitution, laws, or treaties of the

[1] Osborn v. the Bank of the United States, 9 Wheaton 738.

United States. The question whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case, and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the Constitution; laws and treaties of the Union, which seem designed to give the courts of the Government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases in which original jurisdiction is given to the Supreme Court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution. Original jurisdiction, so far as the Constitution gives a rule, is co-extensive with the judicial power. We find in the Constitution no prohibition to its exercise in every case

in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The Constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that, in any such case, the power can not be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the Government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Court original jurisdiction in any case to which the appellate jurisdiction extends.

SEC. 41. The National and the State courts are not foreign to each other, but are interdependent, co-operating systems, and together constitute one vast machine of justice, planned and operated that a remedy may be found for every wrong, and that protection is afforded

the weakest against the most powerful, without regard to residence or nationality.[1]

Each State has a common law of its own, derived, in the case of most of them, from the common law of England, but modified more or less in adoption by circumstances, usages, or statutes. This common law determines to a great extent the civil right of the people, and it also makes many acts punishable as crimes. But the United States, as such, can have no common law.

No act can be a crime against the United States which is not made or recognized as such by Federal Constitution, law, or treaty.[2] But the Federal courts sitting in the several States, where their jurisdiction depends upon the character or residence of the parties who sue or are sued, administer for the most part the local law, and they take notice of the State common law, usages, statutes, and apply them as the State courts would apply them in like controversies. In all such cases of the decisions of the State courts, affording precedents for their guidance, the Federal courts are to follow them for uniformity, and the State decisions will thus become the final rule and authority on questions of State law, for like reasons to those which require finality to Federal decisions on questions of Federal law.

[1] Claflin v. Houseman, 93 U. S. 130.
[2] United States v. Hudson, 7 Crouch. 32.

But there are certain cases in which this rule can not be applied, because the reasons on which it rests are inapplicable. It can not, for example, be applied in any case where the decision of the State court involves a question of National authority, or any right, title, privilege, or exemption derived from or claimed under the Constitution, or any law or treaty of the United States. Let us examine applicable and inapplicable cases with patience.

In the case of Bock v. Perkins, Mr. Justice Harlan said: That every marshal of the United States, as well as his deputy, must take an oath or affirmation that he will faithfully execute all lawful precepts directed to him, and in all things well and truly perform the duties of his office. The marshal must also give bond, with securities, for the faithful performance of the duties of his office by himself and deputies. And marshals and their deputies have, in the respective States, the same powers in executing the laws of the United States as sheriffs and their deputies have in executing the laws of such States. A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States, is one arising under the laws of the United States; and for any failure in that regard, he would be liable to suit by anyone thereby injured. This

case was, therefore, one arising under the laws of the United States, and removable from the State court.[1]

In Buck v. Colbath we may perceive the working of the two systems. Colbath sued Buck in a State court in trespass for taking his goods, the latter pleading simply that he was marshal of the United States, and had seized the goods under an attachment against the property of certain parties named in the writ. The Supreme Court, upon error to the highest court of the State, held that the marshal was guilty of trespass in levying upon the property of one against whom the writ did not run, and could be sued therefore in the State court—the *mere* fact that the writ issued from a Federal Court constituting no defense.[2] The judgment in that case against the marshal was reviewed in the Supreme Court under the act of Congress authorizing such review in cases where a party specially claimed the protection of an authority exercised under the United States, and the decision withheld the protection so claimed.

SEC. 42. The Constitution declares that the judicial power of the United States shall extend to all cases affecting ambassadors or other public ministers and consuls.

Judicial act of 1789 invested the District Courts of the United States with "jurisdiction, exclusively of the courts of the several States of all suits against consuls or

[1] Bock v. Perkins, 130 U. S. 628. *In re* Neagle, 135 U. S. 1.
[2] Buck v. Colbath, 3 Wall. 334. *Ex parte* Crouch. 112 U. S. 178.

vice-consuls," except for offences of a certain character; the Supreme Court, with "original, but not exclusive, jurisdiction of all suits, in which a consul or vice-consul shall be a party" and the Circuit Courts, with "jurisdiction of civil suits in which an alien is a party." In this act we have an affirmance by the first Congress—many of whose members participated in the convention which adopted the Constitution, and were, therefore, conversant with the purposes of its framers—of the principle that the original jurisdiction of the Supreme Court, of cases in which a consul or vice-consul is a party, is not necessarily exclusive, and that the subordinate courts of the Union may be invested with jurisdiction of cases affecting such representatives of foreign governments.

Very early after the passage of that act, the case of the United States against Ravara,[1] was tried in the Circuit Court of the United States for the District of Pennsylvania, before Justice Wilson and Iredell of the Supreme Court, and the district judge. It was an indictment against a consul for a misdemeanor of which it was claimed the Circuit Court had jurisdiction under the eleventh section of the Judiciary Act, giving Circuit Courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States," except where that act "otherwise provides, or the laws of

[1] 2 Dall. 297.

the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." In behalf of the accused it was contended that the Supreme Court, in virtue of the constitutional grant to it of original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, had exclusive jurisdiction of the prosecution against him. Mr. Justice Wilson and the district judge concurred in overruling this objection. They were of the opinion that although the Constitution invested the Supreme Court with original jurisdiction, in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction, in those cases, upon such inferior courts as might by law be established. The indictment was sustained, and the defendant, upon the final trial, at which Chief Justice Jay presided, was found guilty. He was subsequently pardoned on condition that he would surrender his commission and *exequatur*.

United States against Ortega,[1] which was a criminal prosecution in a circuit court of the United States, for the offence of offering personal violence to a public minister, contrary to the law of nations and the act of Congress, one of the questions certified for decision was whether the jurisdiction conferred by the Constitution upon the Supreme Court, in cases affecting ambassadors

[1] 11 Wheat. 467.

THE UNITED STATES SUPREME COURT CHAMBER

or other public ministers and consuls, was not only original but exclusive of the circuit courts. But its decision was waived and the case determined upon another ground. Of that case it was remarked by Chief Justice Taney,[1] that an expression of opinion upon that question would not have been waived had the court regarded it as settled by previous decisions.

In Graham v. Stucken Mr. Justice Nelson said that[2] "it could hardly have been the intention of the statesmen who framed our Constitution to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the Supreme Court to have a jury summoned in order to enable him to recover it; nor could it have been intended that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offence that might be committed by a consul in any part of the United States; that consul, too, being often one of our own citizens." Such was the state of the law when the revised statutes of the United States went into operation. By section 563 it was provided that "the District Courts shall have jurisdiction of all suits against consuls or vice-consuls," except for certain offences; by section 629, that "the

[1] Gittings v. Crawford, Taney's Dec., 15.
[2] Graham v. Stucken, 4 Blatch, 30.

circuit courts shall have original jurisdiction" of certain classes of cases, among which are civil suits in which an alien is a party; by section 687, that the Supreme Court shall have "original but not exclusive jurisdiction of all suits in which a consul or vice-consul is a party"; and by section 711, that the jurisdiction vested in the courts of the United States in the cases and proceedings there mentioned, among which are "suits against ambassadors or other public ministers or their domestics, or domestic servants, or against consuls or vice-consuls," shall be exclusive of the courts of the several States. But by the act of February 18, 1875, that part of section 711, last quoted, was repealed,[1] that, by the existing law, there is no statutory provision which, in terms, makes the jurisdiction of the courts of the United States exclusive of the State courts in suit against consuls or vice-consuls.

SEC. 43. The judicial power of the United States is made to extend to all cases of admiralty and maritime jurisdiction.

It is said that those who framed the Constitution, and the lawyers in America in that day were familiar with a different and more extensive jurisdiction in most of the States when they were Colonies than was allowed in England, from the interpretation which was given by the common law courts to the restraining statutes of Rich-

[1] 18 Stat. 318.

ard II and Henry IV. The commission to the vice-admirals in the Colonies in North America, insular and continental, contained a much larger jurisdiction than existed in England when they were granted.

That to the governor of New Hampshire invested him with the power of an admiralty judge, declares the jurisdiction to extend "throughout all and every the sea-shores, public streams, ports, fresh water rivers, creeks, and arms, as well as of the sea as of the rivers and coasts whatsoever, of our said provinces."[1]

The admirality jurisdiction, ancient and circumscribed as it afterwards was in England, and as it was exercised in the Colonies, was necessarily the subject of examination, when Congress was preparing the declaration and resolves of the 14th of October, 1774, in which it is said "that the several acts of 4 Geo. III, c. 15, 34; 5 Geo. III, c. 25; 6 Geo. III, c. 52; 7 Geo. III, c. 41; 8 Geo. III, c. 22, which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits."[1] The ancient limits of admiralty jurisdiction repeatedly alluded to by men fully acquainted with every part of English jurisprudence as they had believed it had existed in England at one time much beyond what was at that time its exercise in her admiralty courts.

[1] Journals of Congress, 21, 33, 47.

SEC. 44. In the case of the steamship *Magnolia,*[1] which was a proceeding in admiralty on account of a collision occurring in the Alabama River, in the county of Wilcox, in the State of Alabama, it was contended that the jurisdiction in admiralty did not attach, because, first, the collision was within the body of the county, and second, because it was at a point on the river above tide water. But the contentions were overruled on the ground, first, that after the adoption of the Constitution the exercise of admiralty and maritime jurisdiction over its public rivers, ports, and havens, was surrendered by each State to the Government of the United States, without an exception as to the subjects or places, the Supreme Court cannot interpolate one into the Constitution, or introduce an arbritary distinction which has no foundation in reason or precedent, therefore, the objection to jurisdiction that the collision was within the county can have no greater force or effect from the fact that the Alabama River so far as it is navigable, is wholly within the boundary of the State; second, that though in England the flux and reflux of the tide was a sound and reasonable test of a navigable river, because on that island tide-water and navigable water were synonymous terms, yet there is certainly nothing in the ebb and flow of the tide that

[1] 20 How. 296.

makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. The case of Thomas Jefferson, 10 Wheaton, and others, which has hastily adopted this arbitrary and false test of navigable waters, were necessarily overruled.

SEC. 45. The steamship *Moses Taylor*, a vessel of over one thousand tons burden, was owned by Marshall O. Roberts of the city of New York, and was employed by him in navigating the Pacific Ocean, and in carrying passengers and freight between Panama and San Francisco. In October, 1863, the plaintiff in the court below, the defendant in error in the Supreme Court, entered into a contract with Roberts, as owner of this steamship, by which, in consideration of one hundred dollars, Roberts agreed to transport him from New York to San Francisco as a steerage passenger, with seasonable dispatch, and to furnish him with proper and necessary food, water, and berth, or other conveniences for lodging, on the voyage. For alleged breach of this contract, the present action was brought under the statute of the State of California, in a county court of the State. The agent for the *Moses Taylor* appeared to the action and denied the jurisdiction of the court, insisting that the cause of action was one over which the courts of admiralty had exclusive jurisdiction, which objection to the jurisdictions having been overruled and judgment for

the amount claimed given. The case is brought into the Supreme Court of the United States by writ of error from that court.

Justice Field, in delivering the opinion of the court, is reported to have said the case presented is clearly one within the admiralty and maritime jurisdiction of the Federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandise. The same liability attaches upon their execution both to the owner and the ship. The passage money in the one case is equivalent to the freight money in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction.

Particularly by the legislation of the Congress, the cognizance of civil causes of admiralty and maritime jurisdiction vested in the district courts by the ninth section of the judiciary act may be supported upon like considerations. It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of the legislation the State court might have

taken cognizance of these causes. The case of the *Moses Taylor* is not within the saving clause of the ninth section. That clause only saves to suitors "the right of a common-law remedy, where the common-law is competent to give it." It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem,* as used in the admiralty courts, is not a remedy afforded by the common-law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute.

SEC. 46. In 1891, the case of Manchester v. Massachusetts; the case of criminal prosecution in the courts of Massachusetts to impose a fine for violation of a State statute regulating the method of fishing in Buzzard's Bay. The place where the acts charged were committed was in that part of the bay which was within a marine league from the Massachusetts shore at low water mark. The Supreme Court of Massachusetts held the statute to be constitutional. And the defendant sued out a writ of error to the Supreme Court.[1]

The highest court of the United States is reported to have said that the statute of Massachusetts, which the defendant is charged with violating, is, in terms, confined to waters "within the jurisdiction of this Commonwealth"; and it was evidently passed for the preser-

[1] Manchester v. Massachusetts, 139 U. S. 240.

vation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even though they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of the opinion that the statute is not repugnant to the Constitution and the laws of the United States.

It may be observed that section 4398 of the Revised Statutes (a re-enactment of section 4 of the joining resolution of February 9, 1871) provides as follows in regard to the Commissioners of Fish and Fisheries: "The commissioners may take or cause to be taken at all times, in the waters of the sea-coast of the United States, where the tide ebbs and flows, and also in the waters of the lakes, such fish or specimens thereof as may, in his judgment, from time to time, be needful or proper for the conduct of his duties, any law, custom, or usage of any State to the contrary notwithstanding."

This enactment may not improperly be construed as suggesting that, as against the law of a State, the Fish Commissioner might not otherwise have the right to take fish in places covered by the State law.

The pertinent observation may be made that, as Congress does not assert by legislation a right to control pilots in bays, inlets, rivers, harbors, and ports of the United States, but leaves the regulation of that matter to the State, so, if it does not assert by affirmative legislation its right or will to assume the control of manhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays.[1]

We do not consider the question whether or not Congress could have the right to control the manhaden fisheries which the State of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State.

Sec. 47. The judicial power extends "to controversies to which the United States shall be a party." It is a fundamental principle of public law, affirmed by a long

[1] Cooley v. Board of Warden, 12 How. 299.

series of decisions of the Supreme Court, that no suit can be maintained against the United States without express authority of Congress. The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War, nor the Attorney-General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the court in a suit brought against their officers.

Chief Justice Marshall had occasion to remark that "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."[1] "However," says Mr. Justice Gray, "the answer actually filed by the district attorney, is treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment against them, was in excess of the instructions of the Attorney General, and of any power vested by law in him or in the district attorney, and could not constitute 'voluntary submission by the United States to the jurisdiction of the court.'"[2]

SEC. 48. The specific power under examination will

[1] The Exchange, 7 Cranch. 116.
[2] Stanley v. Schwalby, 162 U. S. 255.

also extend "to controversies between two or more States."

In controversies between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably the right remains with the strongest.[1] The judiciary is not that department of the government to which the assertion of its interest against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nations have established.

If the cause of the Nation has been a plain one, its courts would hesitate to pronounce it erroneous.

If those departments which are intrusted with the foreign intercourse of the Nation, which assert and maintain its interest against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political

[1] Foster v. Nelson, 2 Pet. 253, 307, 319.

than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature.

These constructions relate to questions of boundary between independent nations and have no application to a question of that character arising between the general government and one of the States composing the Union, or between two States of the Union.

At the time of the adoption of the Constitution, there existed controversies between eleven States in respect to boundaries which had continued from the first settlement of the Colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise under the new government to be formed must therefore have been perceived by the framers of the Constitution, and consequently among the controversies to which the judicial power of the United States was extended by the Constitution we find those between two or more States. And that a controversy between two or more States, in respect to boundary is one to which, under the Constitution, such judicial power extends, is no longer an open question in the Supreme Court.[1]

[1] Rhode Island v. Massachusetts, 12 Pet. 657. New Jersey v. New York, 5 Pet. 284, 290. Missouri v. Iowa, 7 How. 660. Florida v. Georgia, 17 How. 473. Alabama v. Georgia, 23 How. 505. Virginia v. West Virginia, 11 Wall. 39, 55. Missouri v. Kentucky, 11 Wall 395. Indiana v. Kentucky, 136 U. S. 479. Nebraska v. Iowa, 143 U. S. 357.

In New Jersey v. New York, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing as acts of Congress." And in Virginia v. West Virginia, it was said by Mr. Justice Miller to be the established doctrine of the Supreme Court "that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in United States v. Texas, 143 U. S. 628, Mr. Justice Harland used the following language: "The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *ALL* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally the Union upon an equal footing in all respects with the other States."

But there are few other cases in which the court of the United States has declined its aid, although they are controversies between two States.

In Towley v. Lindsey and Fowler v. Miller, actions of ejectment were pending in the Circuit Court of the United States for the district of Connecticut between private citizens for lands over which the States of Connecticut and New York both claimed jurisdiction; and a writ of *certiorari* to remove those actions into the Supreme Court as belonging exclusively to its jurisdiction, was refused, because a State was neither nominally nor substantially a party to them.[1] Upon a bill in equity afterwards filed in the Supreme Court by the State of New York against the State of Connecticut to stay the actions of ejectment, the Supreme Court refused the injunction prayed for because the State of New York was not a party to them, and had no such interest in their decisions as would support the bill.[2]

The Supreme Court has declined to take jurisdiction of suits between States to compel the preformance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in Kentucky v. Dennison, where the State of Kentucky, by her governor, applied to the Supreme Court

[1] 3 Dall. 411.
[2] New York v. Connecticut, 4 Dall. 1, 3.

in the exercise of its original jurisdiction for a writ of *mandamus* to the governor of Ohio, to compel him to surrender a fugitive from justice, the Supreme Court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ.[1]

SEC. 49. Many questions might arise as to the jurisdiction of the Federal Courts over controversies "between a State and citizens of another State."

The object of vesting in the court of the United States jurisdiction of suits by a State against the citizens of another was to enable such controversies to be determined by a National tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the States of which the defendants were citizens.

The grant is of "judicial power" and was not intended to confer upon the court of the United States jurisdiction of a suit or prosecution by one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all.[2]

SEC. 50. "The courts of no country execute the penal laws of another," stated Chief Justice Marshall. And this maxim applies not only to prosecutions and sentences

[1] Kentucky v. Dennison, 24 How. 66.
[2] Wisconsin v. Pelican Ins. Co., 127 U. S. 265.

for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.

It is true that if the prosecution in the courts of one country for a violation of its municipal law is *in rem* to obtain a forfeiture of specific property within its jurisdiction, a judgment of forfeiture, rendered after due notice, and vesting the title of the property in the State, will be recognized and upheld in the courts of any other country in which the title to the property is brought in issue.[1] But the recognition of a vested title in property is quite different from the enforcement of a claim for a pecuniary penalty. In the one case, a complete title in the property has been acquired by the foreign judgment; in the other, further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right.

The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the Act of Congress

[1] Rose v. Himely, 4 Cranch, 241. Hudson v. Guestier, 4 Cranch. 293. Bradstreet v. Neptune Ins. Co., 3 Sumner 600.

THE CHIEF AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT, 1906

Chief Justice and Associate Justices of the Supreme Court of the United States, 1906

1. Oliver Wendell Holmes, of Massachusetts, Associate Justice of the United States Supreme Court, was professor of Harvard University and Chief Justice of the State Supreme Judicial Circuit Court. He is an alumnus of Yale and Harvard Universities.

2. Rufus W. Peckham, of New York, Associate Justice of the United States Supreme Court, was county District Attorney, an Albany Corporation Counsel, a Justice of the Supreme Court and a Justice of the Court of Appeals of his State. He was educated at the public schools of Philadelphia and the Albany Academy.

3. Joseph McKenna, of San Francisco, Associate Justice of the United States Supreme Court, was Solano County District Attorney, a member of the State Legislature, a United States Representative, a United States Circuit Judge, and a United States Attorney General. He was educated at St. Joseph's College, and the Collegiate Institute.

4. William R. Day, of Ohio, Associate Justice of the United States Supreme Court, was Judge of the Court of Common Pleas, the United States District Judge, Secretary of State of the United States, Chairman of the Spanish-American Peace Commission, and the United States Circuit Judge. He is a graduate of the University of Michigan.

5. Henry Billings Brown, of Massachusetts, (just retired), Associate Justice of the United States Supreme Court, was the State Circuit Judge, the United States Marshal, the United States Attorney, the United States and District Judge. He is an alumnus of Yale, Harvard and Michigan Universities.

6. John Marshall Harlan, of Kentucky, Associate Justice of the United States Supreme Court, was a County Judge of his State, a candidate for Governor and also a candidate for the Vice-Presidency. He was also Chairman of the State Delegation to the Republican National Convention. He is an alumnus of the Center College and the Pennsylvania University.

7. Melville Weston Fuller, of Illinois, Chief Justice of the United States Supreme Court, was a member of the State Constitutional Convention, of the State Legislature, and also a delegate to the Democratic National Convention. He is an alumnus of the Northwestern University, Bowdoin College, Yale and Harvard Universities, and also Dartmouth College.

8. David Josiah Brewer, of Kansas, Associate Justice of the United States Supreme Court, was, in his State, County Attorney, the United States Commissioner, the Judge of the Probate and Criminal Courts, the Justice of the State Supreme Court, the United States District, and also the United States Circuit Court Judge. He is a graduate of Yale University and the Albany Law School.

9. Edward Douglass White, of Louisiana, Associate Justice of the United States Supreme Court, was State Senator, State Supreme Court Justice, and a United States Senator. He was educated in Georgetown University at Washington, D. C.

by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law of usage in the State in which they were rendered. Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment rendered after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged they do not effect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence.

SEC. 51. Mr. Justice Iredell said: "But in respect to the subject-matter upon which such jurisdiction is to be exercised, used the word 'controversies' only.[1] The Act of Congress more particularly mentions civil controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think was well warranted, for it can not be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only, are uniformly considered of a local nature, and to be decided by its particular laws." Chief Justice Jay, in summing up the various classes of cases to which the judicial power of the United States extends, used "demands"—

[1] Chisholm v. Georgia, 2 Dall. 419.

a word quite inappropriate to designate criminal or penal proceedings—as including everything that a State could prosccute against citizens of another State in a National court.

Original jurisdiction of the Supreme Court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed—if, indeed, it could impose—any such limit. If the Supreme Court has original jurisdiction of any case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State for the recovery of any sum of money, however small, by way of a fine for any offence however petty, against her laws could be brought in the first instance in the Supreme Court of the United States. That can not have been the intention of the convention in framing, or of the people in adopting, the Federal Constitution.[1]

Sec. 52. As to controversies "between citizens of the different States," under the act of Congress in Circuit Courts of the United States should have original cognizance of all suits of a civil nature at common law or in equity in which there should be a controversy between citizens of different States.

In Strawbridge v. Curtis,[2] it was held that if there be two or more joint plaintiffs and two or more joint de-

[1] Wisconsin v. Pelican Ins. Co., 127 U. S. 265.
[2] Strawbridge v. Curtis, 3 Cranch. 267.

fendants each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction. This decision was followed by later cases in which it was held that the courts of the United States have no jurisdiction, on the ground of diverse citizenship if there are two plaintiffs to the action who are citizens of and residents in different States, and the defendant is a citizen of and resident in a third State, and the action is brought in the State in which one of the plaintiffs resides.

And in the case of Hooe v. Jamieson, [1] which was an action of ejectment brought in the Circuit Court of the United States for the Western district of Wisconsin, by the complainant, in which plaintiffs in error alleged that they resided in and were citizens of the city of Washington, D. C., and that defendants all resided in and were citizens of the State of Wisconsin, Mr. Chief Justice Fuller delivered the opinion of the court and said: "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in Hepburn v. Elley, 2 Cranch. 445, February term, 1805, 'that the members of the American Confederacy only are the States contemplated in the Constitution.' That the District of Columbia is not a State within the meaning of that instrument; and that the courts of the United States

[1] Hooe v. Jamieson, 166 U. S. 395.

have no jurisdiction of cases between citizens of the District of Columbia and citizens of a State."

SEC. 53. As suits against States: by the judiciary act of 1789, the Supreme Court was given original jurisdiction of all controversies of civil nature between a State and citizens of other States or alien, and exclusive jurisdiction where a State is a party.

Such being the condition of the law, a most important and interesting case has taken place. Alexander Chisholm, as executor of Robert Farquer, commenced an action of assumpsit in the Supreme Court against the State of Georgia, and process was served on the Governor and Attorney General. On the 11th of August, 1792, after a process was thus served, Mr. Randolph, the Attorney-General of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next term, unless the State should then, after notice, show cause to the contrary. At the next term, Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph thereupon proceeded alone, and in opening his argument said that he did not want the remonstrance of Georgia to satisfy him that the motion which he had made is unpopular, before the remonstrance was read,

he had learned from the acts of another State, whose will must always be dear to him, that she too condemned it.

On the 19th of February, 1793, the judgment of the Supreme Court was announced, and the jurisdiction sustained, four of the justices being in favor of granting the motion and one against it. All justices who heard the case filed opinions some of which were very elaborate, and it is evident the subject received the most careful consideration.

Mr. Justice Wilson in his opinion uses this language: "Another declared object (of the Constitution) is, 'to establish justice.' This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the declaration, 'that no State shall pass a law impairing the obligation of contract,' we shall probably think that this object points in a particular manner to the jurisdiction of the court over the several States. What good purpose could this constitutional provision secure, if a State might pass a law impairing such a violation or right, to no controlling power"? And Chief Justice Jay: "The extension of the judiciary power of the United States to such controversies, appears to me to be wise, because it is honest and because it is useful. It is honest, because it provides for doing justice without respect to persons, and by securing individ-

ual citizens, as well as States, in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It it useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens, because it recognizes and strongly rests on this great moral truth, that the justice is the same whether due from one man to a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every one of them to obtain justice without any danger of being overborne with the might and number of their opponents; and because it brings into action, and enforces the great and glorious principle that the people are the sovereigns of this country, and consequently that fellow citizens and joint sovereigns can not be delegated by appearing with each other in their own courts to have their controversies determined."

Prior to this decision, the public discussions had been confined to the power of the court, under the Constitution, to entertain a suit in favor of a citizen against a State; many of the leading members of the convention

arguing with great force against it. As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction. And on the 8th of January, 1798, the Eleventh Amendment to the Constitution, proposed and ratified by the requisite number of States, went into effect. That amendment is as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign power."

SEC. 54. Afterward, it was contended that, notwithstanding the prohibition of the amendment, the States may prosecute the suits, because, as "the sovereign trustee of its citizens," a State is "clothed with right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former."[1] There is no doubt but one nation may, if it sees fit, demand of another nation the payment of debts owing by the latter to a citizen of the former. Such power is well recognized as an evidence of National sovereignty, but it involves also the National powers of levying war and making peace. But the States are not Nations. They are sovereign within their spheres, but

[1] New Hampshire v. Louisiana, 108 U. S. 76.

their sovereignty stops short of nationality. They can neither make war nor peace without the consent of the National government.

It is also claimed that even if a State did surrender to the National government its power of prosecuting the claims of the citizens against another State by force, it got in lieu the constitutional right of suit in the National courts.

There is no principle of international law which makes it the duty of one Nation to assume the collection of the claims of its citizens against another Nation, if the citizens themselves have ample means of redress without the intervention of their government. There is no necessity for power in his State to sue in his behalf, when he can sue for himself. Therefore, the special remedy granted to the citizen, himself, must be deemed to have been the only remedy the citizens of one State could have under the Constitution against another State for redress of his grievances, except such as the delinquent State law saw fit itself to grant.

Sec. 55. Among the unwritten understanding of the American Constitution, perhaps the most jealously contended and contested things in the United States Supreme Court are religious liberty; security of the dwelling, and of persons and papers; prohibition of slavery;

guaranties of life, liberty, and equality; and equal protection of the laws.

As to religious liberty, the United States Supreme Court, through Mr. Chief Justice Waite, had amply discussed that Congress can not pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is: What is the religious freedom which has been guaranteed?

Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate, not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated

in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested to signify their opinion respecting the adoption of such a bill at the next session of assembly.

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed.[1]

In the preamble of this act[2] religious freedom is defined and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when prin-

[1] 1 Jeff. Works, 45; 2 Howison, Hist. of Va., 298.
[2] 12 Hening's Stat., 84.

ciples break out into overt acts against peace and for order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion,[1] but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations.[2] Five of the States, while adopting the Constitution, proposed amendments. Three —New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was

[1] 2 Jeff. Works, 355.
[2] Jeff. Works, 79.

adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the Supreme will of the nation in behalf of the rights of conscience, I shall see with satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritive declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversion of good order.[1]

Sec. 56. In order to ascertain what is said to be in-

[1] Raynold v. U. S., 98 U. S. 145.

tended by the Fourth Amendment to the Constitution under the terms "Unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in the United States and in England. Mr. Justice Bradley was instructed to say by the United States Supreme Court, that the practice had obtained in the Colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book"; since they placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistence of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved the American independence and established

the American form of government. In the period from 1762, when the "North Briton" was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the "North Briton," particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libellous. By authority of the Secretary's warrant Wilke's house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the Secretary of State, who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of

Entick v. Carrington and Three Other King's Messengers, reported at length in 19 Howell's State Trials, 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the Colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time.[1]

SEC. 57. Robertson and the other petitioners were sailors on board the *Arago,* and having deserted the vessel in violation of their contract as seamen they had been returned to said vessel against their will and by force, under the provisions of Congressional Act and it is claimed that section which provides a punishment of imprisonment for desertion by any seamen, is unconstitu-

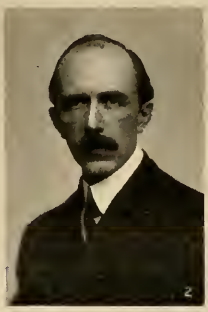
[1] Boyd v. U. S., 116 U. S. 616.

tional under the Thirteenth Amendment to the Federal Constitution, as involving involuntary servitude.[1]

The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words "involuntary servitude" were said in the Slaughter-house Cases, 16 Wall. 36, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards.

The amendments, however, make no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from

[1] Robertson v. Baldwin, 165 U. S. 275.



UNITED STATES AND STATE JUDGES

The United States and State Judges

1. John Kelvey Richards, Judge of the Circuit Court of the United States for the district of the State of Ohio. Graduate of Swarthmore College and Harvard University. United States Solicitor General 1897-1903.
2. Francis E. Baker, Judge of the Circuit Court of the United States for the district of the State of Indiana. Graduate of State University of Indiana and University of Michigan. Judge of the Supreme Court of Indiana.
3. William W. Morrow, Judge of the Circuit Court of the United States for the district of California. Alumni: Wabash College of Indiana. Was special counsel for the United States before French and American Claims Commission, and also counsel before Alabama Claims Commission. Was Representative in Congress,
4. Charles Holland Duell, Associate Justice Court of Appeals, D. C. (Resigned September, 1906, to engage in private practice.) Graduate of Hamilton College Law School. Ex-Commissioner of Patents.
5. Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia. Alumni: Washington and Lee University and Georgetown University. Is professor in the latter.
6. Louis E. McComas, Associate Justice Court of Appeals. Alumni: St. James College and Dickinson College. Was United States Senator from Maryland. Professor in Georgetown University.
7. George Gray, Judge of the Circuit Court of the United States for the district of Delaware. Alumni: Princeton and Harvard Universities. Was Attorney General for Delaware, and also United States Senator from that State, member of the American Peace Commision, Paris; and member of the International Permanent Court of Arbitration under the Hague Convention.
8. Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia. Dean of Georgetown University Law School. Government Delegate, Universal Congress Lawyers and Jurists, St. Louis, 1904. Was Attorney General for the State of Maryland. Graduate of College at Gettysburg.
9. Jeter Connelly Pritchard, Judge of the United States Circuit Court for the district of the State of North Carolina. Was Associate Justice of the Supreme Court of the District of Columbia, 1903. Common school education.
10. Alston Gordon Dayton, Judge of the United States District Court for Northern District of the State of West Virginia. Graduate of University of West Virginia. Was Representative in Congress from West Virginia.

time immemorial been treated as exceptional shall not be regarded as within its purview.

From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as Molloy forcibly expresses it, "to rot in her neglected brine." Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles.

SEC. 58. It was contended that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the Fifth Amendment of the Constitution which forbids the depriving of any person of life, liberty, or property, without

due process of law. To this contention it is to be answered by the language of Mr. Justice Bradley: "But the action of the court in cases within its jurisdiction is due process of law. It is regular and lawful method of proceeding, practised from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. That it embraces many cases in which the offence is indictable is established by an overwhelming weight of authority. This being so, the question whether a particular class of cases of misconduct is within its scope, can not involve any constitutional principle.

It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of *habeas corpus* using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often set-

tled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer an immense field of jurisdiction without trial by jury. In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. "Perhaps no definition," says Judge Cooley, "is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.' "[1]

The question, what constitutes due process of law within the meaning of the Constitution, was much considered in the case of Davidson v. Orleans, 96 U. S. 97; and Mr. Justice Miller, speaking for the court, said: "It is not possible to hold that a party has, without the due process of law, been deprived of his property, when, as regards the issue affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." And, referring to Murray's Lessee v. Hoboken Land and Improvement Co.,

[1] *Ex parte* Wall, 107 U. S., 265.

18 How. 272, he said: "An exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts."

SEC. 59. Equal protection of the laws under the Fourteenth Amendment to the Federal Constitution was made clear by Mr. Justice Brewer in Gulf, Colorado & Santa Fe R. R. Co. v. Ellis.[1] The question to be determined in this case was whether a statute of Texas authorizing the recovery of attorney's fees in addition to damages in actions against railway companies for the killing of stock is constitutional on the ground that it operated to deprive the railway companies of property without due process of law, and denied to them the equal protection of the law in that it singled them out of all citizens and corporations, and required them to pay in certain cases attorney's fees to the parties successfully suing them, while it gave to them no like or corresponding benefit. The distinguished jurist in delivering the opinion of the court, said that the provision was not a legitimate police regulation for the purpose of inducing the railway companies to fence their tracks, and thus prevent injuries to stock, for there was no requirement in the State that

[1] 165 U. S. 150.

tracks of railways should be fenced. Continuing, he used this language: "But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

"Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to preform certain

duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

SEC. 60. The question under consideration in its application to persons other than citizens was extensively discussed by the United States Supreme Court in the Chinese laundry cases. The court has instructed Mr. Justice Mathews to say that the Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differ-

ence of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions the Court had to consider and decide in the Chinese cases, therefore, are to be treated as involving the rights of every citizen of the United States with those of the strangers and aliens who now invoke the jurisdiction of the court.

It was contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the Fourteenth Amendment; and in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimi-

nation, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of the American institutions of government, the principals upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in the American system, while sovereign powers are deligated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of

just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[1]

However, let us understand that the Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in the liabilities imposed.[2]

The inhibition of the Fourteenth Amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of "person" there is no doubt that a private corporation is included. Such

[1] Wick Wo. v. Hopkins, 118 U. S. 356.
[2] Hayes v. Missouri, 120 U. S. 68.

corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said Chief Justice Marshall, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men."[1] The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. Mr. Justice Field had an occasion to say that "the plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax, it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privilege it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation,

[1] Providence Bank v. Billings, 4 Pet. 514, 562.

that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment."[1]

In this connection, let us see whether, since the adoption of the Fourteenth Amendment, a woman who is a citizen of the United States and of one of the States of the United States, is a voter in that State, which confined the right of suffrage to men alone.

The Fourteenth Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the State, but it operates for

[1] Pembina Mining Co. v. Pennsylvania, 125 U. S. 181.

this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

It is true that the United States guarantees to every State a republican form of government (Constitution, Article IV, p. 4). It is also true that no State can pass a bill of attainder (Article I, p. 10), and that no person can be deprived of life, liberty, or property without due process of law (ib. Amendment 5). All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed in any manner especially designated. Here, as in other forms of the in-

strument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

As has been seen, all the citizens of the United States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of

the United States, may under certain circumstances vote. The same provision is to be found in the Constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota and Texas.

Certainly if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. The province of the courts is to decide what the law is, not to declare what it should be.[1]

And at last, the legislative, executive, and judicial powers are co-extensive with each other. They are equal in dignity and of co-ordinate authority. Neither can subject the other to its jurisdiction, or strip it of any portion of its constitutional powers. It is, therefore, very proper that the judiciary, in passing upon questions of law which have been considered and acted upon by the other departments of government, should give great weight to their opinions, especially if they have passed unchallenged for considerable period. The judiciary have often yielded to it when the correctness of a practical con-

[1] Minor v. Happersett, 21 Wallace 162.

struction of the law by the other departments, in the performance of their own duties, was in question. Nevertheless, they can not do this when, in the opinion of the court, the construction is plainly a violation of the Constitution.

As President Roosevelt said at the gathering of the members of the Washington Bar: "It is sometimes a good thing to be heard first. It is always a good thing to have the right to speak last. That right belongs to the Supreme Court. The President and Congress are all very well in their way. They can say what they think, but it rests with the Supreme Court to decide what they have really thought."

In theory and practice the American judiciary is the final authority in the construction of the Constitution and the laws, and its construction should be received and followed by the other departments.

APPENDIX I

APPENDIX I

Before the Promulgation of the Constitution

Among the most notable constitutions of the ancients were those of the Grecian Republics—one set framed by the Amphictyonic Counsel, the other by the Achean League. The first provided that the council should have authority to propose and to do whatever was necessary for the general good of Greece; to declare and carry on war, or to bring it to a close; to decide, as a court of last resort, all controversies arising between its members; it was empowered to direct the whole force of the Grecian confederation against the rebellious. Power besides was given them to admit new members. It must be acknowledged that the Greek constitution was sufficient for general purposes and for the maintenance and enforcement of the laws, but the age in which it was framed was an idolatrous one. Superstition colored their meaning and warped the construction of the constitution. Its influence

permeated society, jealousies and strife were fomented, and hatred and fear awakened among the people. These culminated at last in the Peloponessian War, and the ruin and enslavement of the Athenians who had begun it. The constitution of the Achean League tended to a closer union of the republics than did that of the Amphictyonic Council. Its effects were more wide reaching. Under it the Senate, composed of the entire membership of the League, had power to declare war and make peace; to send out or to receive ambassadors; to form alliances or to make treaties; and to appoint the commander in chief of all the armies, who was commonly called Prætor. At one time all Greece seemed ready to unite in one grand confederation. But one of its members, which had grown stronger and richer than the rest, became its master. The smaller and less important states became jealous and suspicious, and while Sparta and Athens, the two most powerful, were fast becoming a hindrance to the confederation, the lesser states invoked the aid of foreign powers who were their powerful neighbors. These, Egypt, Syria, Macedonia, and Rome, were glad to avail themselves of the invitation to aid in the defence of the weak and the suppression of the strong and it became their pleasing duty, because of the aid lent, to awaken fresh strifes among them, which resulted in further complications, conflicts, and disorders within and without

the confederation and dispelled the last hope of Greece for ancient liberty. Under the walls of Corinth, the Achea, the seat of the federal government, was taken and burned to the ground by Mammins the Roman general. Thus the political existence of Greece was brought to an end. Her arts, the drama, music, poetry, literature, her sciences, her philosophy, her paganism, her superstitions with her luxury and dissipation were all transferred to Rome, whose physical power has subdued her, but over whom she held the mastery of mind, for her great teachers Thales, Pithagoras, Socrates, Plato, Demosthenes, and a host of other great Greeks taught their conquerors.

Perhaps the people who figured most conspicuously upon the arena of the ancient and mediæval world were Romans, for Rome opposed her constraint and prosaic intelligence to the freedom and independence of the Greeks. Roman character was expressed in her religion. The word religion means obligation, a binding power, and their worship was a business-like performance. Duty was a Roman watchword, a law for each, a copy of the will of heaven. The end for which the Roman was born seems to have been to stamp upon the mind of mankind the idea of Law, Government, and Order.

The great Roman poet, Virgil, knew what the Romans' life work was when he sang:

"Other, belike, with happier grace,
From bronze or stone shall call the face,
Plead doubtful cause, map the skies,
And tell when planets set or rise;
But, Roman, thou—do thou control
The Nation far and wide;
Be this thy genius, to impose
The rule of peace on vanished foes,
Show pity to the humbled soul,
And crush the sons of pride."

Truly the Romans framed a most perfect constitution. Bryce says that the facility with which the Roman jurists pass from the universal to the particular and from the particular to the universal is uncontestable and masterly.

"No matter now whether Rome perished as a state or not, Roman law was strong enough to survive Rome," says Sohm; according to Kent, "the Roman law is taught and obeyed not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and the St. Lawrence." So true, it seems, are the words of D'Aguessean that the grand destinies of Rome are not as yet accomplished; for she reigns throughout the world by her reason, after having ceased to reign by her authority. To these the writer would add that the new member of the civilized world of the nineteenth century, the constitutional state, Japan, is a debtor to the Roman Law in no less degree than were the nations enumerated above.

But, in reality, what has become of the political existence of Rome for which the venerable constitution was formed?

Rome lacked a middle class, unity of the great dependencies, lacked the principle of succession in the imperial office, lacked the machinery which the complexity of situation made necessary, lacked a favorable site for her capital city, lacked a popular participation in legislation, lacked proper control of the judiciary, lacked the elective in kingship, lacked in the commutatus, lacked in incorporation and legislation, and above all, Rome had not a Supreme Court of the United States to construe the unwritten understanding of the constitution and lacked the ability to apply the principles of the corpus juries to the ever expanding nation.

The question now to be settled is this: Who shall inherit the civilization which was received from Greece, and what shall be the fate of laws and institutions which had existed and grown up within Rome. In the early age of Christianity the civilization of mediæval Europe was predestined to include the great Teutonic elements, which has imparted to it so much of its peculiar power and grandeur. The Teutonic tribes who appeared upon the scene when a crisis in the history of the world had come and when the race of Rome was run, preserved their ancient remains through the reign of Charlemagne

and the establishment of feudalism, all the way down to the peace of Westphalia.

The Teutonic influence is the dominant principle in the four great Christian kingdoms, Germany, Spain, France and England. The smaller states shared more or less in the same general characteristics. The great and small states alike seem to have followed with few variations, translating the Teutonic principles into their own language. "If English history is not the perfectly pure development of Teutonic principles, it is the nearest existing approach to such a development." The elements that were not Teutonic could not break the tough metal, but melted like snow before the sun in England. It is due to that burning character that King John was forced to grant the *Magna Charta,* A. D. 1215, the most important provision of which was, that "no freemen shall be taken or imprisoned or disseized or outlawed or banished or anyways destroyed, nor will the king pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land." Founded upon the charter the fabric of constitutional liberty of an Englishman was slowly but surely erected. The King, Henry III, was soon obliged to establish Parliament in A. D. 1264; and in the beginning of the reign of Charles I he received further assurance in "The Petition of Right" of 1628, that "no man be compelled

to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament; that none be called upon to make answer for refusal so to do; that a freeman be imprisoned or disseized only by the law of the land, or by due process of law, and not by the king's special command without any charge." An Englishman has followed up in the next reign and secured the right under the *Habeas Corpus* Act to receive "speedy relief from all unlawful imprisonment and to enforce upon judicial and other officers the duty of deliverance." The liberty loving people were not contented with those that have been received already. In 1688, he insisted and gained the "enumeration and reaffimation of such right of the Englishman," through what is called the Bill of Rights. These charters, he has made use of as the principles or instrumentalities in extending and broadening of his right in the still greater Charter of the English Common law.

The middle age in England was that age in which the Teutonic elements were absorbing the foreign elements, and the love of personal liberty and the sense of independence, virtues of the Teutons, were working out in the crucible of experience in the Hellenic-Roman civilization. In a juster view, it was the germinating season; the seeds of modern England cast into the soil were quickening into new institutions and a new nation-

ality—the Englishman. "Language, law, custom and religion preserve their original conformation and coloring. The German element is the paternal element in the English system, natural and political. Analogy, however is not proof, but illustration; the chain of proof is not to be found in the progressive, persistent development of English constitutional history from the primeval polity of the common fatherland."

When the curtain goes up on modern history, we have disclosed to view the revolt of the Teutonic spirit known as the Reformation—the banner of the free spirit face to face with its creator, determined to have truth found, and right done, without regard to human tradition, authority, intervention or privilege. The spirit of inquiry, set free, was changing and blessing the whole world. To this we owe in modern literature some of the noblest creations of the human intellect. To this are due the discoveries of science, which have made life longer, easier and brighter. Hence have come in every land the triumphs of truth and genius over prejudice and power. This it is which has discovered the American continent, has revealed the secrets of Central Africa, and the isles of the Pacific, has diminished distance by steam and destroyed it by electricity, and last and best, has created the greatest of modern republics, and has filled the colonial world with flourishing, self-governing

people, who have no crown or sovereign but the flag, the emblem of dignity, power and authority, which has prepared and is preparing the reign of universal peace.

Exploring the New World and colonial development therein were shared by the large as well as the small states, Spain, Portugal, England, Dutch Republic, Sweden, France, Poland, and Germany. The account of the failure or triumph of these countries in the explorations and colonization is not our aim. The view should be narrowed down as much as possible into the peculiar character of the Teutonic exploration and colonization, which in the dark age was predestined to ripen and bloom freely in the founding of the greatest of republics, as an illustrative example to the student of modern history of an interesting contrast to the most progressive and most spoiled nations of Greece and Rome.

In so far as the exploration of the sea is concerned, nearly all of ancient history in Europe as it has come down to us deals with peoples about the Mediterranean. When hardy sailors crept along the shore through the Strait of Gibraltar and thence to Britain, it was deemed a wonderful achievement and after this nothing of importance was discovered by sea from the days of Julius Caesar to the fifteenth century. It is difficult to separate truth from fiction in the account of the settlement in

New England before 1000 A. D., of Norsemen coming from Iceland and Greenland; but the account of the warriors of Taira Clan, who, after the decisive battle of Danno-ura, fled to the American continent and settled there before 1200 A. D., is more easily understood, as it was natural that they should follow the Japanese current which flows past the Pacific coast and warms the shore of California.

However, to trace the Teutonic achievement in the colonization of America—a Genoese sailor and a Spanish queen made the first discovery and were followed by John Cabot and his son, Sebastian, the Italian sailors under English commission. The former landed in 1492 at Hayti and from there went later to Havana, the latter in A. D. 1497, landed on the North American coast, but as to whether they had any idea that they had discovered the new world is extremely doubtful. Next in point of time, that is in 1498, came a man from Florence, Italy, whose name and writing sound the sweetest of all which has lasted to the present time—"Americus" and the "New World." The colonization of first significance made by France was in 1604. The French explorers settled in Port Royal, Nova Scotia and founded Quebec. They sailed up the Great Lakes and down the Mississippi. In a comparatively short time the French explored the whole of the immense Mississippi basin

between the Rocky Mountains and the Appalachian chain as far down as Lower Canada. The Spanish and the Portuguese are the pioneers in the armed campaigns. The Spanish claimed Mexico and Peru, invaded Florida and established a permanent settlement at St. Augustine in 1565. It is to be noted that the Spanish, the Portuguese and the French did most of the work of discovery and exploration by land and sea, and the English did practically no work; but in colonizing they outstripped all competitors.

The English were as anxious for gold and other precious things of the earth as the Spaniards, but as they could not see gold in sand dunes, they went at the subject in a more profitable way and stole negroes from Africa to sell to the Spanish in America for gold. When war broke out between Spain and England, Phillip II sent in 1588 his "invincible Armada," only to have it scattered to the winds or sent to the bottom of the sea by Drake and Howard, so that the English, capturing Spanish galleons got their share of gold with very little work, besides adding new laurels to the crown of the Virgin Queen, who now set up a claim to most of North America. Permanent English settlement was effected by corporations known as the London and Plymouth Companies. The charter of these companies gave to the colonists all the political and civil rights and privi-

leges of Englishmen. The London Company was to have the southern part of the country, the Plymouth Company the northern part, while the middle ground, from the present city of New York to the mouth of the Potomac was to be open to both. The London Company's first expedition was composed of about one hundred persons, who laid out a village in 1607 and called it Jamestown. Two years later, five hundred more colonists came out, and twelve years after the first settlement there were found four thousand white persons in Virginia, besides a considerable number of negro slaves. In 1619, the colonists were divided into eleven settlements, which were known as boroughs and it was necessary that some form of government be devised for the colonies as a whole and for defining the relations of the boroughs to each other. If the settlers had been Spaniards or Frenchmen or Italians, no initiative would have been taken. In the dividing, the settlements began an instinctive movement toward regulation of public affairs of the American colonists, which peculiarity the Teutonic family had back in the barbaric days in the European forests. "It is the characteristic of the Teutonic race and those who have assimilated with it, to take strong ground on private rights, but acknowledge duty to others." In dividing the settlements the first American government was brought into being. The

enterprise of the London Company was so successful in the colonizing effort that for sixty-five years there were upward of 40,000 self-supporting white people in Virginia.

In those days, the frequent changes in the throne of England led to religious difficulties. Henry VIII modified Romanism and set up the Established Church, but when Mary succeeded the youthful Edward VI, Catholicism was restored and later Elizabeth restored the Church of Henry VIII. All these changes became the cause of the great movement known as Puritanism. This movement, as did Methodism at a later date, began within the church. James was a Presbyterian, but he was not true to the church in practice, and Charles believed in the ritualism of the Established Church but his belief was changeable and was always dependent upon his perogatives. In consequence, the independent movement started, and ended in the separation of it from the Established Church, much as Luther and his followers had left the Roman Catholic Church. The Pilgrims fled to Holland, thence to America on board the ship *Mayflower* of the Plymouth Company. They sailed from the Dutch town of Leydon on the 16th of September and reached America on the 21st of November. The landing on the "rock" was made December 21, 1620; the place was named Plymouth. It

was a bitter cold winter, and more than half of the Pilgrims died before spring. Here again the Pilgrim fathers revealed the characteristic earnestness, thrift and consciousness that changed the appearance of things as unpromising as one could imagine. The good harvest of the first year was celebrated by the institution of the now National festival of Thanksgiving. The Pilgrims struggled long and hard for a bare existence, while the Virginians soon grew rich; the Virginians raised tobacco and the Pilgrims raised men, which was about all the soil could support. Next came to America the Puritans, who believed in the infallibility of their religion as sincerely as the Catholics did in theirs. They came from their home to exploit their own religious idea. Charles I gave them a charter, and first colonists were sent over in 1628, and founded the settlement of Massachusetts Bay; two years later John Winthrop came over with about one thousand persons and settled in the neighborhood of the present city of Boston. In the next ten years some 20,000 more came. Here the first voice was raised for the separation of the church and state, whereupon the clergyman, Roger Williams, was met by the King's wrath and ordered home for punishment; but he and his followers instead of obeying the order, set off through the woods and established a town which was called Providence, in the present State

of Rhode Island. A new colony was founded near Portsmouth, New Hampshire, by John Mason and on the Maine coast by Sir Ferdinando Gorges, both of whom were the King's friends; and in 1679 Charles II made of these a new royal colony called New Hampshire. In 1638, a new colony under the leadership of the Reverend John Davenport came from England and formed the New Haven colony. The latest sect that came to Massachusetts was that of Quakers or Friends, the mildest people in Christendom, only to conflict with the Masaschusetts religious views; but this they avoided by removing into Rhode Island in 1659. Carolina, named in honor of Charles II, had first been settled by the Huguenots, whom the Spanish massacred, and in 1663, Charles granted a charter whereby a settlement was made, the leading one being Charleston.

It is worth noting that we owe to the Dutch some of the first important settlements in America. Hendrick Hudson was one of the most daring explorers of the period. To find a route to India, he started in 1609, and had discovered the bay, which bears his name to this day. The Dutch settled in the country, the center being Albany. They were great traders and soon opened a route with the Indians for furs. The Swedes, also, formed a settlement on the Delaware, where Wilmington now stands, and were for a time prosperous. But

in 1655 Peter Stuyvesant came from New Amsterdam, now New York, and beseiged the Swedes, claiming all the land under Hudson's discoveries, and as a result, the empire of New Sweden fell. The thrifty Dutch soon grew prosperous only to arouse the jealousies of the English, who suddenly remembered that Cabot had discovered the continent of North America, and who soon sent a fleet in 1664, which conquered the Dutch. Their territory was given to the King's brother, the Duke of York, and named in his honor, New York. James gave what is now New Jersey to a couple of his friends, Lord Berkeley and Sir George Carteret. With regard to the colony of Maryland: it was first founded by the refugees of the Catholics in England, who were denied civil rights and persecuted for their religion and who founded this prosperous State in 1636, with the religion tolerated under Lord Baltimore. William Penn, the son of an English admiral, to whom the crown owed money, concluded to make a settlement in America, and proposed to settle the bill for a grant of land in America. The result was the grant of all the country north of Maryland, west of the Jerseys, and south of New York, as the State of Pennsylvania stands today. The last settlement was made in 1732 when George II granted a charter to James Oglethorpe, for which the colony was named in the King's honor. Briefly this is the founda-

tion of the English colonies in America. From the accession of William and Mary to that of George III the American colonies throve and emigration poured in from many parts of Europe. The Germans swarmed into Pennsylvania. There were Scotch and Irish in southern Pennsylvania and Virginia, who were pushed back into the mountains, where their descendents in West Virginia and Kentucky today keep up family feuds made memorable in song and story. The Huguenots went to the Carolinas. The wave of immigration has crossed the Appalachian Chain, the Rocky Mountains and the Sierra Nevada. Meantime, the colonies were gaining a good deal of their population by the redemption system; the redemptioners, who were largely Germans, soon became not only valued citizens, but were also found useful as artillerymen when General Washington needed them. Thirteen American colonies of Great Britain occupied all the country from St. Croix River to the Florida line, and from the Atlantic to the Mississippi south of the St. Lawrence and the Great Lakes. There were in 1760 some 1,600,000 persons, including about 400,000 slaves, and in 1770 the population had increased to double this figure in round numbers.

Thus stood the colonists in 1770, prosperous, virtuous, industrious and loyal to the crown. We shall get an entirely erroneous idea of the fathers of the revolu-

tionary movement now approaching in the colonies, if we do not look at the condition of politics in England; for the love of country is inherent in Englishmen. After the expulsion of the Stuarts, England was ruled mostly by foreigners for seventy odd years. William III was a Dutchman. Mary was an Englishwoman, but wife of William. Anne was an Englishwoman, but she was ruled by her ministers. George I and George II were foreigners who could scarcely speak English. Parliament had then reached a commanding position in England. In 1760, only about one-tenth of the adult males voted for the members of the lower House of Parliament, and seats were distributed as they had been two centuries before. The members were largely friends and henchmen of the nobility, and great county families who owned seats and distributed them as they chose. Under such circumstances it can be seen that it was easy to use corrupt methods and influence to control elections. In Great Britain for many years there was constant trouble between a bigoted minister and a dogged and occasionally half insane King. The revolution that came with the colonies benefitted England, as one result was the gradual growth of reform.

Parliament was now in control of colonial legislation, and enacted laws regulating trade, which were designed to make the colonies do all their buying and selling in

England. But the colonies ignored all the regulations. Parliament was busy with other matters, so that the colonies were let alone for a time. In 1760 George III came to the throne, and George Granville into office in 1763, when the situation of the colonies became very different. Granville was an industrious man, who was by no means pleased to learn that many of the laws concerning trade were ignored and evaded. He had no malice toward the colonists, but he erred in the remedy he proposed. The Stamp Act was passed in 1765, making it necessary to use stamped paper for many purposes. The Englishman has hated nothing so much as taxation. This should be remembered in all his history. The colonists were Englishmen, and reasonably claimed all the rights, privileges and immunities of Englishmen, and objected vigorously to the exercise of the taxing power in a body which in no sense represented them. On November 7, 1765, the Stamp Act Congress, composed of the delegates from the colonies, met in New York. A protest against the Act was passed, with petitions to the King and Parliament. The victory of Pitt in securing a repeal of the Stamp Act soon followed, but that victory was a barren one, for Parliament passed three acts in 1767, one of which laid direct taxes on all tea, glass, paper, paints and some other articles imported to the colonies, and which were, therefore, more objectionable

than the Stamp Act. One can hardly understand the stupidity of the men who concocted this act. It was simply another method of asserting the right to tax the colonists by ostensibly giving them a bribe to accept this principle. Such a plan in another part of the world might not have met with so much disfavor, but in the New World, where the Teutonic family of nations formed the government, it was a " pin prick " policy.

Not stopping to glance over the scientific system of the colonists in smuggling tea, not arguing against the crown officers searching anywhere they pleased for the alleged smuggled goods and invading the cherished belief of the Englishman that his house is his castle, and also not attracting our attention to the Quebec Act in its relation to Canadians, let us pass over to the more important event which took place in Philadelphia September 5, 1774, where the First Continental Congress met to consider how to assist the Englishman in the exercise of his legal rights. A petition was drawn up to the King, in which loyalty was professed and in which the repeal of the obnoxious acts were requested. The complaints were principally directed to four points: (1) imposing taxes without the consent of the people's representative, (2) keeping up standing armies in time of peace to overawe the people, (3) denying the right to trial by jury of the vicinage in some cases, and

providing for a transportation of persons accused of crimes in America for trial in Great Britain, (4) exposing the premises of the people to searches, and their persons, papers, and property to seizures on general warrants. If this had been all, American history might have been different, but the Congress resolved that in case the repressive legislation was enforced, all America should resist it by force. It was this that hardened the heart of George III and his ministers, who subsequently ordered the British army and officers to keep the colonists from preparing for a conflict.

Learning that the colonists had established a depot of supplies at Concord, some twenty miles from Boston, on April 18, 1775, General Gage sent about eight hundred men under Major Pitcairn to destroy the stores and incidentally picked up John Hancock and Samuel Adams at Lexington on the way home. The two latter were to be sent to England for trial on a charge of treason, but long before the troops were under way the colonists were preparing to receive them. The first encounter was on Lexington Green, where a few Minute men had hastily gathered. Seven colonists fell dead. It is not known by whom the order to fire was given, but this was the "shot heard round the world." The news spread like wildfire. Though there had been no declaration of war, yet everyone saw the struggle was on.

Without discussing independence or any other issue, Congress elected George Washington, of Virginia, Commander-in-chief; while the King's answer to the petition of the colonists was war.

The war actually began on April 18, 1775. It was intensified by American fire that drove the English assaulting column down the Bunker Hill on July 16th. When Howe evacuated Boston, March 17, 1776, and when Washington marched his army to Brooklyn, Long Island, the question of Independence had come to agitate Congress. And finally the declaration, which was drawn up by Thomas Jefferson, of Virginia, and revised by Benjamin Franklin, John Adams, Roger Sherman and Robert R. Livingston was adopted July 4, 1776, in the State House.

In the declaration, as had been actuated by "a decent respect for the opinion of mankind," alleged against the King and Parliament the famous eighteen accusations. The colonies gave prominence to the declaration in the following solemn and impressive decree:

"We, therefore, the Representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the name and by the authority of the good people of these Colonies, solemnly publish and declare that these United Colonies are, and

of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our secret honor."

Meantime the war was brough to a decisive campaign when Washington besieged Cornwallis, and by the surrender of the latter on October 19, 1781, the war was practically over; yes, actually, it was ended by Washington's disbandment of the army on April 19, 1783, eight years from the day the Minute men gathered on Lexington Green. The treaty of peace was agreed to by the American peace commissioners, Benjamin Franklin, John Jay and John Adams on November 30, 1782, and was finally concluded September 3, 1783.

Peace hath her troubles no less than war. When the was was over the States drifted back into their old ways before the war. Each had its own laws. Strong jealousies and rivalries existed, which manifested them-

selves in legislation. Each State had its own tariff law, and discriminated against its neighbors. Each State was in debt for the war. Congress was in debt for the loans it had made abroad, and borrowed money to pay the interest. The old self-constituted Continental Congress had been succeeded by the Congress formed under the Articles of Confederation. It seems paradoxical, but the States under the Articles of Confederation were in many respects less satisfactory than before the war began. If the Articles of Confederation had been stronger American history might have been shorter, but as they were so weak, a stronger government was possible. Thoughtful men saw that something must be done speedily, and the result was the Constitutional Convention of 1787, which marks the turning point in American history. The Convention was called to amend the Articles of Confederation, but it adopted a new constitution entirely. Fortunately for other races, and for the American generations the states sent delegations of their ablest men. From Massachusetts came Nathaniel Gorham, Rufus King, Elbridge Gerry and Caleb Strong. From New York came Alexander Hamilton, John Lansing, and Robert Yates; from Delaware, Gunning Bedford, Jr., George Read, and John Dickinson; from Pennsylvania, Jard Ingersoll, Robert Morris, Thomas Miffin, James Wilson, and Benjamin Franklin; from Virginia, James

Madison, Edmond Randolph, George Mason and George Washington; from New Jersey, William Paterson and Jonathan Jayton; from North Carolina, William Blount and Alexander Martin; from South Carolina, Pierce Butler, John Rutledge, Charles Pickney and Charles C. Pinckney; from Georgia, William Houston and Abraham Baldwin; from Connecticut, Roger Sherman and Oliver Ellsworth; from Maryland, Daniel Carroll and James McHenry; from New Hampshire, John Langdon and Nicholas Gilman. Rhode Island was not represented. Not all the delegates are here enumerated, but the names given indicate the high quality of the Convention, which met in Philadelphia, May 25, 1787. It did not complete its work until September 17th, all of its sessions being held in secret.

George Washington was elected President, and it was in great measure due to the certainty that he would be the first executive of the United States that the Constitution was finally adopted.

The strong government party, or the Whigs, later called the Federal party, headed by Alexander Hamilton, James Madison and John Jay, advocated the adoption of the Constitution, and their pens supplied much of the current political literature of that day. Against the Federal party, the Particularist Whigs, later called the Anti-Federal party, opposed every preliminary step look-

ing to the adoption of the federal constitution and adhered to the rights of the States and those of local self-government. The Anti-Federalists party was not without popular orators and leaders. Patrick Henry and Samuel Adams took special pride in espousing the cause of the Anti-Federals. The war question between the Whigs and the Tories, or Colonial parties,—the former composed of patriots, the latter supporting the Crown—must have passed quickly away as living issues came up, though the newspapers and contemporaneous history show that the old taunts and battle cries were applied to the new situation with a plainness and virulence that must still be envied by the sensational and more bitterly partisan journals of our own day. To read these now, and some of our facts are gathered from such sources, is to account for the frequent use of the saying "the ingratitude of republics," for when partisan hatred could deride the still recent utterances of Henry before the startled assembly of Virginians, and of Adams in advocating the adoption of declaration, there must, at least to every surface view, have been rank ingratitude. Their good names, however, survived the struggle, as good names in American republics have ever survived. In politics the Teutonic and related races then as now, characteristically hated with promptness and forgave with generosity.

APPENDIX II

APPENDIX II

Constitution of the United States

WE, THE PEOPLE of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ouselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SEC. 2. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

(Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. *The clause included in brackets is amended by the fourteenth amendment, second section*). The actual enumeration shall be made within three years

after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative, and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president *pro tempore,* in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disquaification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations except as to the places of choosing senators.

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same, and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emolument whereof shall have been increased during such time; and no

person holding any office under the United States, shall be a member of either house during his continuance in office.

Sec. 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

Sec. 8. The congress shall have power:—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities, and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money, to that use, shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful building:—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SEC. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or *ex post facto* law, shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative or person

holding an office of trust or profit under the United States, shall be appointed an elector.

(The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person has a majority, then from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president. *This clause has been superseded by the twelfth amendment*).

The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer

shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States."

SEC. 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SEC. 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SEC. 4. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SEC. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so constructed as to prejudice any claims of the United States or of any particular state.

SEC. 4. The United States shall guaranty to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislature of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this con-

stitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; *provided,* that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatuers, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

(Signed by)

GEORGE WASHINGTON,

President and Deputy from Virginia,

and by Thirty-nine Delegates.

ARTICLES IN ADDITION TO AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

SECTION 1. The electors shall meet in their respective states and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate:—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted:—the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly

convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citzens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SEC. 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for loss or emancipation of any slave; but all such debts obligations, and claims shall be held illegal and void.

SEC. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SEC. 2. The congress shall have power to enforce this article by appropriate legislation.

The first ten of these amendments were proposed by congress by resolution of 1789, and were ratified before 1791. The eleventh amendment was proposed by congress by resolution of the year 1794, and was ratified before 1796. The twelfth article was proposed by congress, by resolution of October, 1803, and was ratified before September, 1804. The thirteenth article was proposed by congress, by resolution, of the year 1865, and was ratified before December 18, 1865. The fourteenth article was proposed by congress, by resolution, of the year 1866, and was ratified before the 20th day of July, 1868. The fifteenth article was proposed by congress, by resolution, of the year 1869, and was ratified before the 30th day of March, 1870.

INDEX

INDEX.